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Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1393

CHARLES CROCKARELL,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AT CINCINNATI

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 15, 1973.

## CITATIONS TO OPINIONS BELOW

1. Order of the Court of Appeals unreported filed February 15, 1973 (Appendix A-76).

## JURISDICTION

The Court of Appeals entered judgment on February 15, 1973, time for filing has been extended for filing this petition to April 16, 1973.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

I.

Whether the calling by the prosecution in a criminal case of a witness the prosecution knows will invoke his 5th Amendment right to refuse to answer questions on cross-examination violates the defendant's Sixth Amendment right to be confronted with the witnesses against him and/or his right to cross-examination under the due process clause of the 5th Amendment.

II.

Whether the failure of a trial judge to hold a complete evidentiary hearing outside the presence of the jury is violative of the due process clause of the 5th Amendment and the requirement of 18 U.S.C. §3500 (Jencks Act), where it is shown that a tape recording allegedly impeaching a key government witness has been destroyed by government agents.

## CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

1. Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases aris-

ing in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Statute 18 U.S.C. 3500:

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on

motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Petitioner respectfully contends the Writ should be granted as it presents issues important to the criminal processes not yet passed upon by the Court, but which will continue to be raised in other cases.

II. The petitioner has not received needed and proper relief by the Courts below

## STATEMENT OF CASE AND FACTS

A five count indictment was filed against petitioner on September 15, 1971, charging in Count One that petitioner, from on or about August 24, 1970, to on or about November 17, 1970, conspired with Lim Manners, Melvin Lynn Manners and Larry Neal Manners, in violation of Title 18, §371, U.S.C., to defraud the United States by manufacturing, distilling, possessing, transporting, removing, depositing and concealing untaxed distilled spirits by using his official position as Sheriff of Stewart County, Tennessee, to execute the conspiracy by furnishing them a confiscated still and to conceal and protect the operations. In Count Two petitioner was charged as an aider and abetter. In Count Three petitioner was charged with unlawfully possessing a still, in violation of Title 26, §5686(a), U.S.C. In Count Four petitioner was charged with unlawfully possessing eight (8) butane gas condensers and two (2) burners, in violation of Title 26, §5686(a), U.S.C. In Count Five petitioner was charged with unlawfully possessing two (2) cooling tubs, in violation of Title 26, §5686(a), U.S.C.

The Trial Court, upon petitioner's motion, entered a judgment for acquittal on Count Two. Petitioner was found guilty by the Jury on Counts One, Three, Four and Five and was sentenced to two (2) years and fined the sum of $3,000 under Count One, with four months to be served in jail and the remaining twenty months suspended and placed on probation and that imposition of sentence under Counts Three, Four and Five would be suspended.

On August 4, 1970, Special Investigator Hubert T. Giles, of the Alcohol, Tobacco and Firearms Division and the petitioner went looking for an illegal still which was not found that day. Giles testified that on September 1, 1970, the petitioner told him that he had found a still and had destroyed it, and that on November 17, 1970, Giles

himself found an illegal still in the Leatherwood section of Stewart County and, in conjunction with the discovery, he arrested Larry Manners and Melvin Manners.

Wilford J. Souza, a professional photographer, testified that on August 13, 1970, he took some pictures of a still which was located in petitioner's yard. He also testified that he took some pictures of the still which Special Investigator Giles found on November 17, 1970. Deputy Sheriff Alvin Crutcher testified that he assisted the petitioner in the seizure of the still on August 12, 1970, and carried it to the petitioner's residence. He also testified that on September 24, 1970, the still was still in the petitioner's smokehouse.

Lim Manners, twice convicted in Federal Court on whiskey charges, testified that in the last days of August, 1970, he met petitioner and paid petitioner $1,400 for the still. Then sometime in the latter part of September, Manners testified that he and his son, Melvin Manners, went to the petitioner's house and took the still from petitioner's smokehouse and that he never saw the still again.

Melvin Manners testified that he was arrested with his brother, Larry Manners, while operating an illegal still on November 17, 1970, and that it was the same still that he had gotten from petitioner. Thereafter, petitioner's counsel, on cross-examination, asked the witness about the operation of the still and the source of his supplies. The Trial Court at first allowed petitioner's counsel to ask the witness who his supplier was. Then in a hearing out of the presence of the Jury, he refused to instruct the witness to answer the questions (App. A-11-19). Petitioner's counsel requested the court reporter to transcribe Melvin Manners' testimony from the previous trial (which ended in a mistrial) and after this was done, the Trial Court permitted petitioner's counsel to question the witness on the source

of his supplies (App. A-19-26). Then, in the presence of the Jury, when the question was asked, the witness claimed his privilege against self-incrimination (App. A-26). A recess was taken, the Jury was excused, then brought back in, and again in front of the Jury, the Trial Court instructed the witness to answer and he again refused (App. A-27-28). Again the Jury was excused (App. A-28-29). An attorney was then appointed to represent the witness and he stated that this same situation occurred in the previous trial (App. A-29-32). The Trial Court then changed its decision and allowed the witness to claim the privilege (App. A-34). Petitioner's counsel then made a motion that the witness' entire testimony be stricken, which was denied (App. A-35). The Trial Court then had the Jury brought back and explained why he was allowing the witness to claim the privilege (App. A-35-36).

Petitioner's defense was that he had indeed confiscated the still in question, but that it had been stolen from his smokehouse and that he had never received any money from Lim Manners.

Lim Manners was then recalled by the Government in rebuttal and, on cross-examination, he testified that it was not his still that petitioner had seized on August 12, 1970. Petitioner's counsel had been given a copy of a four page statement in which it was stated, in effect, that it was Lim Manners' still. The Trial Court then began to conduct an inquiry into the preparation of the statement (App. A-36-39). When it was learned that the statement was made from a tape recording made by one Clayton Spiers, an attorney was appointed for him (App. A-40-43).

After consulting with the attorney, the Trial Court, out of the presence of the Jury, called Spiers as its witness (App. A-43-44). He testified as to what he remembered was on the tape. The Trial Court then stated that he

would call and put Spiers on the stand before the Jury and that he would order the Government to put on the agents who took the tape and testify as to how the four page statement was prepared. This was to be in front of the Jury (App. A-52-53). Petitioner's counsel objected to this procedure, but was overruled. Then the Trial Court stated that he would not interrogate the witness Spiers in front of the Jury, but this would be done by either the Government or petitioner's counsel in open Court (App. A-53-57). The Government objected to this course of action.

The Trial Court then suggested that petitioner's counsel call Agents Rollins and Giles, since they had prepared the four page statement (App. A-58). Petitioner's counsel was reluctant to call the Government's agents as his witnesses (App. A-58). The Trial Court then stated "We are not going to play around with this case and get a mistrial" (App. A-58).

The Trial Court refused to adjourn the trial for a full investigation of the matter and ordered petitioner's counsel to talk to the Government agents to see if he wanted to put them on the stand. Petitioner's counsel refused to put them on the stand and to enter into a prepared stipulation with the Government. Once again the Trial Court stated that it was up to petitioner's counsel to put on the Government agents (App. A-59-74). Petitioner's counsel then called the agent who destroyed the tape and the secretary who burned her notes on the tape.

Appeal was perfected to the U. S. Court of Appeals for the Sixth Circuit. A short order affirming was returned, the Court did not discuss any of the issues raised holding simply that no prejudicial error had occurred (App. A-76).

Petitioner is now properly before this Court by this Petition.

## ARGUMENT

### I.

**Whether the Calling by the Prosecution in a Criminal Case of a Witness the Prosecution Knows Will Invoke His Fifth Amendment Right to Refuse to Answer Questions on Cross-Examination Violates the Defendant's Sixth Amendment Right to Be Confronted with the Witnesses Against Him and/or His Right to Cross-Examination under the Due Process Clause of the Fifth Amendment.**

The petitioner submits that the use of testimony given by a witness who exercised his privilege against self-incrimination on cross-examination constituted a violation of his right of confrontation contained in the Constitution, *U.S. Const.*, Amend. 6.

While admittedly the petitioner and the witness were confronted in a physical sense, the U. S. Supreme Court has indicated that the right of confrontation consists of more than mere physical proximity. In *Barber* v. *Page*, 390 U.S. 719, 725 (1969) it was stated that "the right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." It was the former aspect of the right of confrontation that was absent in the instant case.

Of the two purposes of the confrontation right, the Courts have emphasized the opportunity to cross-examine the witness. Exceptions to the confrontation requirement have been permitted in situations where the defendant has had the opportunity to cross-examine the unavailable witness at some earlier judicial proceeding, *Mattox* v. *U. S.*, 156 U.S. 237 (1895). In admitting the missing witness's testimony under these circumstances courts have pointed

to the fact that the previous cross-examination is freely admissible, *Owens* v. *Eyman*, 434 F.2d 1062 (9th Cir., 1970), *Jones* v. *Calif.*, 364 F.2d 522 (7th Cir., 1966). No such opportunity was available to the petitioner.

The petitioner submits that Melvin Manners' refusal to answer certain questions on cross-examination (App. A-23-29), on grounds of the privilege against self-incrimination in essence denied him of his right to confront the witness. In the face of this constitutional violation, the Trial Court should have stricken the witness' testimony.

At the petitioner's first trial, the prosecution called Melvin Manners as a witness. While answering all questions put to him during direct examination, he refused to answer certain ones asked during cross-examination. The prosecution was aware of this when he called the witness to testify in the instant trial (App. A-19-26). The petitioner submits the prosecutor realized that the witness would claim the privilege against self-incrimination upon being cross-examined upon certain questions. The petitioner thereupon submits it was reversible error for the testimony given by the witness on direct examination to be admitted in evidence.

In a recent U. S. Court of Appeals case, *U. S.* v. *King*, 461 F.2d 53 (8th Cir. 1972), it was held that the government unduly prejudiced the defendant by calling two witnesses when it was aware that both planned to assert the privilege against self-incrimination. The witnesses both invoked the privilege during direct examination. In the instant case the privilege was invoked by the witness during cross-examination. The distinction is not material. The defendant in both cases was thrown into a bad light as a result of the witness's refusal to give testimony. In *King*, the jurors, as a result of the failure of the witness to testify, were permitted to speculate, as to the defendant's

guilt. In the instant case, the witness was insulated from an attack upon his credibility.

An important limitation placed upon the idea that the calling of a witness who it is known will invoke his privilege against self-incrimination was demonstrated in *Namet* v. *U. S.*, 373 U.S. 179. In *Namet*, despite the use of witnesses who refused to testify, the U. S. Supreme Court affirmed the conviction. The reason was the lack of bad faith on the part of the prosecutor. At page 187 in the opinion the Court stated that "the prosecutor did not believe that the witnesses could properly invoke their privilege against self-incrimination."

II.

**Whether the Failure of a Trial Judge to Hold a Complete Evidentiary Hearing Outside the Presence of the Jury Is Violative of the Due Process Clause of the Fifth Amendment and the Requirements of 18 U.S.C. §3500 (Jencks Act) Where It Is Shown That a Tape Recording Allegedly Impeaching a Key Government Witness Has Been Destroyed by Government Agents.**

During the testimony of the key prosecution witness, Lim Manners, it was discovered that the source of a four page statement earlier attributed to the witness was actually a tape recording of a conversation by the witness (App. A-40-43). The tape had been destroyed by a federal agent (App. A-40). As a "recording [of] a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneous with the making of such oral statement" the tape would probably have been discoverable to the defendant under the *The Jencks Act*, 18 *U.S.C.* §3500. When the United States was unable to provide the petitioner with the tape because of the actions

of the federal agent in destroying it, the Trial Court had a statutory obligation to determine whether that action constituted an election "not to comply" under 18 *U.S.C.* §3500(d). The petitioner submits that to satisfy this obligation a full hearing concerning the tape was necessary.

The U. S. Supreme Court has recognized the existence of this obligation in *Campbell* v. *U. S.*, 365 U.S. 85 (1961) when it stated at page 95:

> "The statute [the Jencks Act] . . . implies the duty in the trial judge affirmatively to administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute . . . the Government . . . and . . . the accused . . ."

This judicial obligation was cited as an important aspect of the Jencks Act in *Ogden* v. *U. S.*, 303 F.2d 724. The Court in *Ogden* at page 733 stated that:

> "an affirmative duty is placed upon the Trial Court to secure the information which is necessary to a proper ruling on particular requests for production in the light of the statutory purposes."

*U. S.* v. *Bryant*, 439 F.2d 642 (D.C. Cir., 1971), demonstrated that the loss or destruction of a possible Jencks Act statement, such as the tape, was the type of question that the Trial Court should inquire into with greater thoroughness. The petitioners in *Bryant* were convicted primarily on the basis of an undercover agent's testimony as to conversations involving the petitioners. Although the conversation had been taped, the tape was subsequently lost while in the federal agent's possession. In remanding the case, the Court of Appeals ordered the trial court "to determine the degree of negligence or bad

faith involved on the part of the government." While several other factors were cited as being appropriate for the Trial Court's consideration, the conclusion is inescapable that when a possible Jencks Act statement is allegedly unavailable, the Trial Court is under a duty to make a detailed and thorough investigation into the circumstances surrounding its disappearance, outside the presence of the jury—this was not allowed by the trial court (A-53).

The contention might be made that destruction of a possible Jencks Act statement by federal agents before trial without the prosecutor's knowledge cannot be considered to be an election on the part of the Government. The petitioner submits that there are two fundamental reasons for rejecting this contention. The first reason is because the cases in this area simply do not support it. Courts have consistently refused to distinguish between cases where prosecutors were charged with control of the Jencks Act statement and those in which federal agents exercised complete dominion.

The petitioner submits as a second reason for rejecting the above contention the fact that to accept it would mean a frustration of a central policy behind the Jencks Act, i.e. providing the accused with a possible basis to impeach the Government's witness. Even in the absence of bad faith on the part of federal agents, the danger that such agents would adopt a policy of destroying the verbatim pre-trial statements of government witnesses is one too real to ignore.

Subsection (d) provides the Trial Court with two alternatives if the Government elects not to comply with the Jencks Act. The Court may "strike from the record the testimony of the witness" or if it deems the damage to be of such a magnitude that striking the testimony will not rectify that damage, the Court may declare a mistrial.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted

Respectfully submitted,

DALE QUILLEN

*Attorney for Petitioner,*
*Charles Crockarell*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
AT CINCINNATI

**No. 72-1750**

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

vs.

CHARLES CROCKARELL,
*Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

# BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

### I.

**Whether the Trial Court Committed Reversible Error in Failing to Conduct a Full and Proper Jencks Act Hearing Concerning a Statement Made by the Key Government Witness Against Appellant and in Failing to Strike That Witness' Testimony When It Was Learned That the Tape Recording and Shorthand Notes Which Led to the Statement Were Destroyed by Government Agents.**

The District Court answered this question "No".

Appellant contends the answer should be "Yes".

II.

**Whether Calling to the Witness Stand a Witness, Knowing He Will Invoke His Privilege Against Self-Incrimination, Adds Critical Weight to the Prosecutor's Case in a Form Not Subject to Cross-Examination and, Thus, Unfairly Prejudices the Appellant.**

The District Court answered this question "No".

Appellant contends the answer should be "Yes".

III.

**Whether the Trial Court Erred in Allowing the Government to Argue State Law to the Jury.**

The District Court answered this question "No".

Appellant contends the answer should be "Yes".

## STATEMENT OF THE CASE AND FACTS

A five count indictment was filed against petitioner on September 15, 1971, charging in Count One that petitioner, from on or about August 24, 1970, to on or about November 17, 1970, conspired with Lim Manners, Melvin Lynn Manners and Larry Neal Manners, in violation of Title 18, §371, U.S.C., to defraud the United States by manufacturing, distilling, possessing, transporting, removing, depositing and concealing untaxed distilled spirits by using his official position as Sheriff of Stewart County, Tennessee, to execute the conspiracy by furnishing them a confiscated still and to conceal and protect the operations. In Count Two petitioner was charged as an aider and abetter. In Count Three appellant was charged with unlawfully possessing a still, in violation of Title 26, §5686(a), U.S.C. In Count Four

petitioner was charged with unlawfully possessing eight (8) butane gas condensers and two (2) burners, in violation of Title 26, §5686(a), U.S.C. In Count Five appellant was charged with unlawfully possessing two (2) cooling tubs, in violation of Title 26, §5686(a), U.S.C.

The Trial Court, upon petitioner's motion, entered a judgment for acquittal on Count Two. Appellant was found guilty by the Jury on Counts One, Three, Four and Five and was sentenced to two (2) years and fined the sum of $3,000 under Count One, with four months to be served in jail and the remaining twenty months suspended and placed on probation and that imposition of sentence under Counts Three, Four and Five would be suspended.

On August 4, 1970, Special Investigator Hubert T. Giles, of the Alcohol, Tobacco and Firearms Division and the petitioner went looking for an illegal still which was not found that day. Giles testified that on September 1, 1970, the petitioner told him that he had found a still and had destroyed it, and that on November 17, 1970, Giles himself found an illegal still in the Leatherwood section of Stewart County and, in conjunction with the discovery, he arrested Larry Manners and Melvin Manners.

Wilford J. Souza, a professional photographer, testified that on August 13, 1970, he took some pictures of a still which was located in appellant's yard. He also testified that he took some pictures of the still which Special Investigator Giles found on November 17, 1970. Deputy Sheriff Alvin Crutcher testified that he assisted the petitioner in the seizure of the still on August 12, 1970, and carried it to the petitioner's residence. He also testified

that on September 24, 1970, the still was still in the petitioner's smokehouse.

Lim Manners, twice convicted in Federal Court on whiskey charges, testified that in the last days of August, 1970, he met petitioner and paid petitioner $1,400 for the still. Then sometime in the latter part of September, Manners testified that he and his son, Melvin Manners, went to the petitioner's house and took the still from petitioner's smokehouse and that he never saw the still again.

Melvin Manners testified that he was arrested with his brother, Larry Manners, while operating an illegal still on November 17, 1970, and that it was the same still that he had gotten from petitioner. Thereafter, petitioner's counsel, on cross-examination, asked the witness about the operation of the still and the source of his supplies. The Trial Court at first allowed petitioner's counsel to ask the witness who his supplier was. Then in a hearing out of the presence of the Jury, he refused to instruct the witness to answer the questions (App. A-11-19). Petitioner's counsel requested the court reporter to transcribe Melvin Manners' testimony from the previous trial (which ended in a mistrial) and after this was done, the Trial Court permitted petitioner's counsel to question the witness on the source of his supplies (App. A-19-26). Then, in the presence of the Jury, when the question was asked, the witness claimed his privilege against self-incrimination (App. A-26). A recess was taken, the Jury was excused, then brought back in, and again in front of the Jury, the Trial Court instructed the witness to answer and he again refused (App. A-27-28). Again the Jury was excused (App. A-28-29). An attorney

was then appointed to represent the witness and he stated that this same situation occurred in the previous trial (App. A-29-32). The Trial Court then changed its decision and allowed the witness to claim the privilege (App. A-34). Petitioner's counsel then made a motion that the witness' entire testimony be stricken, which was denied (App. A-35). The Trial Court then had the Jury brought back and explained why he was allowing the witness to claim the privilege (App. A-35-36).

Petitioner's defense was that he had indeed confiscated the still in question, but that it had been stolen from his smokehouse and that he had never received any money from Lim Manners.

Lim Manners was then recalled by the Government in rebuttal and, on cross-examination, he testified that it was not his still that petitioner had seized on August 12, 1970. Petitioner's counsel had been given a copy of a four page statement in which it was stated, in effect, that it was Lim Manners' still. The Trial Court then began to conduct an inquiry into the preparation of the statement (App. A-36-39). When it was learned that the statement was made from a tape recording made by one Clayton Spiers, an attorney was appointed for him (App. A-40-43).

After consulting with the attorney, the Trial Court, out of the presence of the Jury, called Spiers as its witness (App. A-43-44). He testified as to what he remembered was on the tape. The Trial Court then stated that he would call and put Spiers on the stand before the Jury and that he would order the Government to put on the agents who took the tape and testify as to how the four page state-

ment was prepared. This was to be in front of the Jury (App. A-52-53). Petitioner's counsel objected to this procedure, but was overruled. Then the Trial Court stated that he would not interrogate the witness Spiers in front of the Jury, but this would be done by either the Government or petitioner's counsel in open Court (App. A-53-57). The Government objected to this course of action.

The Trial Court then suggested that petitioner's counsel call Agents Rollins and Giles, since they had prepared the four page statement (App. A-58). Petitioner's counsel was reluctant to call the Government's agents as his witnesses (App. A-58). The Trial Court then stated "We are not going to play around with this case and get a mistrial." (App. A-58).

The Trial Court refused to adjourn the trial for a full investigation of the matter and order petitioner's counsel to talk to the Government agents to see if he wanted to put them on the stand. Petitioner's counsel refused to put them on the stand and to enter into a prepared stipulation with the Government. Once again the Trial Court stated that it was up to petitioner's counsel to put on the Government agents (App. A-59-74). Petitioner's counsel then called the agent who destroyed the tape and the secretary who burned her notes on the tape.

## ARGUMENT

### PROPOSITION I

**Whether the Trial Court Committed Reversible Error in Failing to Conduct a Full and Proper Jencks Act Hearing Concerning a Statement Made by the Key Government Witness Against Appellant and in Failing to Strike That Witness' Testimony When It Was Learned That the Tape Recording and Shorthand Notes Which Led to the Statement Were Destroyed by Government Agents.**

The Government furnished appellant with a four page statement purporting to be a statement made by Lim Manners. On cross-examination, Lim Manners denied two key sentences attributable to him in the statement. It was then discovered that the Government had a tape of a conversation by Lim Manners and the information in the four page statement was taken from the tape. The tape was destroyed by the Government.

With the above information, the Trial Court attempted to conduct a Jencks Act *in camera* hearing. In *Campbell v. United States*, 81 S.Ct. 421 (1961), the Supreme Court set out the proper procedure when it stated at page 426:

> "The Interview Report resembles the statement Staula described and the judge indicated that he would order its production if it was that statement or a copy of it, or although not the original or a copy, if Staula had read and approved it, or if it was a contemporaneously recorded substantially verbatim recital of Staula's oral statement. Nevertheless, the judge ruled that it was for the petitioners to subpoena Toomey as 'their wit-

ness' if they believed his testimony would support their motions, and that he would not of his own motion summon Toomey to testify, or require the Government to produce him. We think that this ruling was erroneous.

The inquiry being conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. The function of prosecution and defense at the inquiry was not so much a function of their adversary positions in the trial proper, as it was a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination. These considerations standing alone suggest that the emphasis on the petitioners' burden to produce the evidence was misplaced. The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute—the interest of the Government in safeguarding government papers from disclosure, and the interest of the accused in having the Government produce statements which the statute requires to be produced.

[9, 10] The circumstances of this case clearly required that the judge call Toomey of his own motion or require the Government to produce him. Not only did the Government have the advantage over the defense of knowing the contents of the Interview Report

but it also had the advantage of having Toomey in its employ and presumably knew, or could readily ascertain from him, the facts about the interview. In addition to the consideration that the interest of the United States in a criminal prosecution '* * * is not that it shall win a case, but that justice shall be done, * * *.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 314, the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. United States v. New York, N. H. & H. R. Co., 355 U.S. 253, 256, 78 S.Ct. 212, 214, 2 L.Ed.2d 247, note 5. Moreover, the petitioners' cross-examination of Staula had shown a *prima facie* case of their entitlement to a statement and, at the least, the judge should have required the Government to come forward with evidence to answer that case. Cf. United States v. Costello, D.C., 145 F. Supp. 892, 894-895, note 13. Since the Interview Report was not, and under Palermo could not be, made available to the petitioners, and they thus had no way of knowing the significance of its contents to the question the judge was to determine, it saddled an unfairly severe burden on them to require them to subpoena Toomey as 'their witness.' In the role of petitioners' witness, they would be groping in the dark in questioning him, and they might be bound by his answers. As a witness called by the Government or even as the court's witness, they would have a latitude in cross-examination to which the circumstances entitled them.

[11] Instead of calling Toomey or having the Government call him, the trial judge fell into further error by relying upon Staula to supply the informa-

tion he sought. Over the objection of government counsel that the Interview Report had not been 'recorded contemporaneously with the making of such oral statement,' and over the objection of the petitioners that 'If this man now reads that statement it loses its effect for purposes of impeachment,' the judge directed Staula to read the Interview Report and say whether he was familiar with it. The witness said that he had never seen the report. The judge then asked Staula '* * * is that a substantially verbatim recital of what you told Agent Toomey?' The witness replied, 'That's not written up just the way the story is.' 'There are things in there turned around.' It was after this testimony was elicited from Staula that the judge ruled he would not order the delivery of the Interview Report to the petitioners, and denied their motion to strike the witness' testimony.

Reliance upon the testimony of the witness based upon his inspection of the controverted document must be improper in almost any circumstances. The very question being determined was whether the defense should have the document for use in cross-examining the witness. Under Palermo, the trial judge was not to allow the defense to inspect the Interview Report 'in order to argue whether it should be allowed to see' it, since to do so would be inconsistent with the congressional purpose to limit access to government papers. Similarly, Staula should not have been allowed to inspect the Interview Report, since there necessarily inhered in the witness' inspection of the paper the obvious hazard that his self-interest might defeat the statutory design of requiring the Government to produce papers which are 'statements' within the statute. For example, the Interview Re-

port states that Staula was unable to give any description of one of the robbers. This is in sharp contrast to his positive identification of Lester made on direct examination. Experienced trial judges and lawyers will readily understand the value of the use of the report on cross-examination of the witness. But the petitioners were deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent.

Moreover, failure of the judge to call for Toomey's testimony foreclosed a proper determination of the petitioners' motion to strike the witness' testimony. If the Interview Report was not the original or a copy of the paper Staula described, and that paper was destroyed, the petitioners might have been denied a statement to which they were entitled under the statute. Thus, even if the Interview Report itself were producible, a situation might have arisen calling for decision whether subsection (d) of the statute required the striking of the testimony of the witness. The parties argue whether destruction may be regarded as the equivalent of noncompliance with an order to produce under that subsection. The Government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of Toomey's testimony."

In *Ogden* v. *United States*, 303 F.2d 724 (1962) the Court of Appeals stated:

> "The Jencks Act was intended to protect Government files from unwarranted disclosure, but it was equally its purpose to make available to the defendant certain of the materials in the possession of the Government which might lead to the impeachment of Government witnesses. An affirmative duty is placed upon the Trial Court to secure the information which is necessary to a proper ruling on particular requests for production in the light of the statutory purposes. The prosecution and defense have a duty beyond that imposed by their adversary positions in the trial proper to assist the Court in this effort.
>
> "It is perhaps worth adding that the effectiveness of the Act, and the realization by defendant of the rights which the Act accords him, necessarily depends upon a fair and full disclosure by the Government. The Court and the defendant must grope; only the Government knows the contents of its own files. When the question of Jencks Act production is properly raised by the defendant, it is incumbent upon the Government to make the fullest disclosure to the Court, withholding nothing from the Court which might conceivably come within the Act."

In *Killen* v. *U. S.*, 82 S.Ct. 302 (1961), Justice Whittaker stated at page 308:

> "Petitioner argues that the claimed destruction of the agent's notes admits the destruction of evidence that may have been helpful to him and deprives him of his rights under Sec. 3500 and to due process of law.
> . . .

> "If the agent's notes of Ondrejka's oral reports and expenses were made only for the purpose of transferring the dates thereon to the receipts to be signed by Ondrejka, and if, after having served that purpose they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right."

It is submitted that the tape recording and shorthand notes were not destroyed in accordance with normal practice and in good faith and that the Trial Court failed to conduct a proper Jencks Act hearing into the entire matter. It appears that the Trial Court was more concerned with finishing the trial within a certain time than with the rights of the defendant. The defendant should have been allowed adequate time to develop the taking of the tape and its destruction by the Government before the Jury. (See *Canaday* v. *U. S.*, 354 F.2d 849 (1966) and *U. S.* v. *Keig*, 320 F.2d 634 (1963)).

## PROPOSITION II

**Whether Calling to the Stand a Witness, Knowing He Will Invoke His Privilege Against Self-Incrimination, Adds Critical Weight to the Prosecution's Case in a Form Not Subject to Cross-Examination and, Thus, Unfairly Prejudices the Appellant.**

In order to test the credibility of the witness, Melvin Manners, the appellant's counsel asked him to name his supplier. The Trial Court allowed this question to be asked in front of the Jury. However, a recess was taken and the Trial Court refused to instruct the witness to

answer. The Trial Court then changed his mind and allowed the question and, in the presence of the Jury, the question was asked again and the witness claimed his privilege. Another recess was taken, the Jury was then brought back in, the Trial Court instructed the witness to answer and, again, the witness refused. Again a recess was taken and an attorney was appointed. The attorney stated that this same situation had occurred in the previous trial. The Trial Court then allowed the witness to claim the privilege, the Jury was brought back in and he attempted to explain to the Jury why he had allowed the witness to claim his privilege.

It is submitted that the Government knew when it called the witness that he would claim the privilege against self-incrimination when asked certain questions on cross-examination. A similar circumstance had occurred in the first trial. Thus, the appellant was denied his right to cross-examine the witness and his testimony should have been stricken. *U. S.* v. *Amadio*, 215 F.2d 605 (1954); *U. S.* v. *Tucker*, 267 F.2d 212 (1959).

## PROPOSITION III

**Whether the Trial Court Erred in Allowing the Government to Argue State Law to the Jury.**

Appellant submits that he was not charged in the indictment with any violation of any Tennessee Criminal Statutes. Yet the Government, over the objection of appellant's counsel, did introduce evidence that the appellant violated two Tennessee Criminal Statutes, one dealing with the destruction of a still and the other with

reporting the still (App. A-74-77). Over objection of appellant's counsel, the Government was allowed to argue the alleged violations of state law to the Jury (App. A-74-77). However, the Trial Court, before argument, said that he would give cautionary instructions to the Jury (App. A-75). He never did (App. A-77).

Appellant was not charged with a violation of state law, yet he was forced to defend these charges by the Government and no cautionary instructions were given. In *Easter* v. *United States,* 441 F.2d 425 (1971), the Court of Appeals stated at page 427:

> "We note that the learned Trial Judge carefully explained that no charge was made here of a violation of Iowa law but that the instruction was given only if the Jury found it relevant as to representations made by appellant to prospective subscribers."

In *Morris* v. *United States,* 156 F.2d 525 (1946) the Court of Appeals stated at page 529:

> "The charge to the Jury should not leave the Jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged."

## CONCLUSION

For the above enumerated reasons, the appellant respectfully requests that his conviction on all counts should be reversed and the case dismissed.

Respectfully submitted,

DALE QUILLEN
*Attorney for Defendant-Appellant*

# APPENDIX

## DOCKET ENTRIES

9-15-71 Indictment filed.

9-15-71 Praecipe for warrant filed.

9-15-71 Warrant for arrest of deft. with att. copy of Indictment attached issued to U. S. Marshal.

9-16-71 Warrant for arrest of deft. ret. executed.

10-18-71 Oct. 8, 1971. Deft. P. N. G. to each ct. Ordered deft. be allowed to and including Oct. 22, 1971 time within which to file pre-trial motions. Att. copy USDA, USP, deft. & D. Quillen, Esquire.

10-26-71 Motion for Discovery & Inspection filed. Cert. of Serv. attached.

11-10-71 Order entered. Cause came on to be heard upon the Motion for Discovery & Inspection heretofore filed on behalf of the deft. Accordingly, the motion is granted to the extent agreed upon by the parties, but, otherwise, is overruled generally. Att. copy USDA, deft. and D. Quillen, Esquire.

1-11-72 Subp. to testify returned executed as to W. J. Souza, Lim Manners, Jim Dowdy, Randall Barrow, Larry Manners, Melvin Manners, Dalton Bagwell, and Alvin E. Crutcher.

1-13-72 Subp. to testify returned executed as to Alvin E. Crutcher, Lim Manners, Larry Manners, Melvin Manners, Randall Barrow, W. J. Souza, Jim Dowdy, and Dalton Bagwell.

1-20-72 January 13, 1972 Order entered. Jury on yesterday respited until today and the trial of this case was resumed. In the absence of the jury, the defendant's counsel made an oral motion for a mistrial. After a hearing was held on said motion, the Court granted the defendant's oral motion for a mistrial, and so ordered. Jury brought back and discharged from the case. Ordered this case be reset to 9:00 A.M., on March 9, 1972, for trial. Att. copy USA, USP, deft. and attys. of record.

1-20-72 January 12, 1972 Order entered. Jury selected. After hearing part of the evidence in the case, the hour for adjournment having arrived, the jury was respited until January 13, 1972. Att. copy US Attorney.

3-10-72 March 8, 1972 Order. Ordered that the trial date now set for March 9, 1972, be continued, to be reset for a later date. Att. copy USA, USP. deft. and atty. of record.

3- 9-72 Subp. to testify returned executed as to Joe Kent and Dewayne Kent.

4-12-72 Motion filed by atty. D. Quillen & moves the Court to continue the case which is set for April 18, 1972. Cert. of Serv. attached. Affidavit of Dale Quillen.

4-13-72 Affidavit of James L. Jackson, Jr., D. D. S. filed.

4-14-72 Order entered as to the Motion for Continuance of Trial. Ordered the said motion for continuance is granted. Ordered this case be reset for trial at 9:00 A.M., Tue. May 30, 1972. Att. copy USA, USP. deft. and D. Quillen, Esq. and Wm. Howell, Esquire.

6-21-72 *NOTICE OF APPEAL FILED. Copy to USA. John Hamlin, & 6th Circuit.

7- 3-72 Statement of Docket Entries and Crim. Appeals Form mailed to 6th Cir.

4-18-72 S/T ret. exec. as to Lim Manners, Larry Manners, Melvin Manners, Alvin E. Crutcher, Jim Dowdy, Dalton Bagwell, Randall Barrow, W. J. Souza, Dewayne Kent, Joe Kent.

5-30-72 Motion filed by the defendant for an order directing the U. S. Atty. to determine and make known certain info relative to certain Govt. witnesses, etc. C/S. attached.

5-30-72 Memorandum in support of defendant's motion, with C/S attached—filed.

6- 1-72 O.C.R. Transcript (original & copy) of portion of testimony of Melvin Lin Manners given on January 12, 1972.—filed.

6- 2-72 O.C.R. Transcript (copy) of portion of proceedings had on June 2, 1972,—filed.

6- 5-72 Defendant's Special Jury Requests Nos. 1 through 5, each marked: "Denied-Judge Frank Gray, Jr."—filed.

7-20-72 May 30, 1972. Deft. P.N.G. Jury selected. Thereafter, in absence of jury, the attys. moved the Ct. to direct the U. S. Atty. to determine & make known to the attys. for the deft. certain information relative to certain Government witnesses, which motion was denied by the Court, and so Ordered. At conclusion of the Government's proof, the deft. moved the Ct. for a judgm. of acquittal as to all cts. of the ind. which motion was denied by the court and so

ordered. Jury respited until June 1, 1972. Att. copy USA, USP. deft. & atty. of record.

7-20-72 June 1, 1972. Jury returned and resumed. In absence of the jury the deft. moved the Court to strike the entire testimony of the witness Melvin Lim Manners, which motion was denied by the Court & so ordered. At close of the Government's proof, the deft. moved for a judgm. of acquittal which motion was denied by the court and so Ordered. Jury respited until June 2, 1972. Att. copy USA, USP. deft. & attys. of rec.

7-20-72 June 2, 1972. Jury resumed. At conclusion of all proof the jury was respited until June 5, 1972. Thereupon the deft. moved the Court to dismiss the indictment, or in the alternative, to declare a mistrial, or in the alternative, to strike the entire testimony of the witness Melvin Lin Manners, which motions, and each of them, were denied by the Court, and so Ordered. Thereafter the deft. moved the Court for a judgm. of acquittal as to each ct. which renewed motion was denied by the Court and so ordered. Att. copy USA, USP, deft. and attys. of record.

7-20-72 June 5, 1972. Jury returned. In absence of the jury the deft. through his attys. renewed the motion for a mistrial, which motion was denied by the Court and so ordered. Thereafter, count two of the indictment was dismissed by the Court *sua sponte*, and the deft. Ordered discharged from custody under said ct. 2. After hearing all proof, the jury retired to consider

of their verdict. Jury returned into open ct. and reported they found deft. Charles Crockarell GUILTY as charged under each cts. one, three, four and five of the ind. Jury discharged, ordered judgm. be reserved on the jury verdict of guilty under cts. one, three, four and five until Monday, June 12, 1972 & deft. shall remain on his present bond. Att. copy USA, USP. deft. and attys. of record.

7-20-72 June 12, 1972. Judgm. and Commitment entered. Deft. P.N.G. & a jury verdict of guilty under cts. one, three, four and five of the indictment. (Ct. 2 having heretofore been dismissed sua sponte by the Court) Sentenced to two (2) yrs. and fined the sum of $3,000.00 with remain under ct. one of the in. Ordered all sent. under ct. one be suspended except for four (4) months under the provisions. Section 3651, T. 18, USC the sentence of imprisonment to be in a jail type institution. Further Ordered that deft. be placed on probation for the remaining time, twenty (20) months, to begin when deft. is released from custody under the four (4) months sentence of imprisonment. Further Ordered that imposition of sentence be suspended under cts. three, four and five of the indictment and the said prd. of probation to run concurrently with the period of probation imposed under ct. one of the ind. Prob. w/superv. 3 cps. USP. 2 USM. 1 USA.

7-26-72 OCR'S transcript proceedings of May 30, June 1, 2, 5, 1972 filed. two volumes.

## INDICTMENT

(Filed September 15, 1971)

### COUNT ONE

The Grand Jury charges:

That beginning on or about August 24, 1970, and continuing to and including on or about November 17, 1970, in the Middle District of Tennessee, Nashville Division, and within the jurisdiction of this Court, and at other places to the Grand Jurors unknown, CHARLES CROCKARELL, who is designated herein as a Defendant, did unlawfully, willfully, knowingly, feloniously and fraudulently combine, conspire, confederate, agree and have a tacit understanding with Lim Manners, Melvin Lynn Manners, Larry Neal Manners, not herein named as Defendants, but named as co-conspirators, and various other persons to the Grand Jurors unknown, in violation of Section 371 of Title 18, United States Code, to defraud the United States by manufacturing, distilling, possession, transporting, removing, depositing and concealing distilled spirits on which a tax had not been paid with the intent to defraud the United States of said tax and to commit certain offenses against the laws of the United States pertaining to the illicit, unlawful and fraudulent manufacture, possession, transportation and distribution of distilled spirits, to wit:

(a) To unlawfully, wilfully, and knowingly have in possession and custody and under control certain stills and distilling apparatuses used and intended to be used for the distillation of distilled spirits set up without having same registered as required by law, in violation of Section 5601 (a) (1), Title 26, United States Code.

(b) To unlawfully, wilfully, and knowingly remove, deposit and conceal a certain commodity for and in respect whereof a tax was imposed by the laws of the United States of America and which tax had not been paid, to wit: certain quantities of distilled spirits, the exact quantities being to the Grand Jurors unknown with the intention to evade collection by the United States of America, of the tax imposed on such spirits, in violation of Section 7206(4), Title 26, United States Code.

(c) To unlawfully, wilfully, and knowingly engage in and carry on the business of distillers of spirituous liquors without having given bond as required by law, in violation of Section 5601(a)(4), Title 26, United States Code.

That is to say, it was the plan and purpose of said conspiracy that the said defendants and co-conspirators would and did violate the aforesaid statutes in the Middle District of Tennessee on or about the dates as follows:

(a) That they did unlawfully, knowingly and wilfully have in possession and custody and under control an unregistered distillery and distilling apparatus set up in Stewart County in the Middle District of Tennessee on or about November 17, 1970.

(b) That they did at the unregistered distillery described in the preceding paragraph of this indictment unlawfully, wilfully, and knowingly engage in and carry on the business of a distiller without having given bond as required by law.

(c) That they did possess, transport, remove and conceal distilled spirits produced at said afore-mentioned distillery in Stewart County in the Middle District of Tennessee in amounts and on dates unknown to to the Grand Jurors.

(d) That the said CHARLES CROCKARELL would and did use and employ his official position as Sheriff of Stewart County, Tennessee, to execute the conspiracy by furnishing and providing a confiscated still and distilling apparatus to be used and employed in said operations from discovery, and the participants therein, and the illicit products produced thereby, from arrest and seizure by law enforcement officers having jurisdiction to enforce the laws of the State of Tennessee and of the United States pertaining to the manufacture and distribution of nontaxpaid distilled spirits.

And the Grand Jury further charges that having so conspired, combined, confederated and agreed, said defendants and co-conspirators in furtherance of said conspirace and to effect the objects and purposes thereof, did commit numerous overt acts within the jurisdiction of this Court and among which overt acts are the following, on or about the dates alleged, to wit:

1. During the period between August 24, 1970 and August 30, 1970, the exact date being unknown to the Grand Jurors, in Brownfield Section of Stewart County, Tennessee, Lim Manners paid CHARLES CROCKARELL the sum of $1,400.00, more or less.

2. During the period between September 20, 1970, and September 30, 1970, the exact date being unkown to the Grand Jurors, in Dover, Tennesee (Stewart County), CHARLES CROCKARELL, Lim Manners and Melvin Lynn Manners removed a still, condenser, a gasoline pump, and other distilling apparatus from a smokehouse located on the premises of the said CHARLES CROCKARELL, and the said Lim Manners and Melvin Lynn Manners transported the same to the Leatherwood Section of Stewart County, Tennessee.

3. During the period between September 24, 1970 and September 30, 1970, the exact date being unknown to the Grand Jurors, at the farm of CHARLES CROCKARELL in the Standing Rock Section of Stewart County, CHARLES CROCKARELL delivered eight (8), more or less, butane gas tanks and two (2), more or less, high-pressure burners to Lim Manners, Larry Neal Manners and Melvin Lynn Manners.

4. During the period between September 24, 1970 and September 30, 1970, the exact date being unknown to the Grand Jurors, Lim Manners, Larry Neal Manners and Melvin Lynn Manners removed two (2), more or less, cooling tubs from the farm referred to in preceding Overt Act No. 3 of this indictment.

5. During the period between September 24, 1970 and September 30, 1970, the exact date being unknown to the Grand Jurors, Larry Neal Manners and Melvin Lynn Manners set up an unregistered distillery in the Leatherwood Section of Stewart County, Tennessee.

6. On November 17, 1970, Larry Neal Manners and Melvin Lynn Manners operated the unregistered distillery referred to in preceding Overt Act No. 5 of this indictment.

## COUNT TWO

And the Grand Jury further charges:

That on or about November 17, 1970, in the Middle District of Tennessee, Nashville Division, and within the jurisdiction of this Court, Lim Manners, Larry Neal Manners and Melvin Lynn Manners, who are not designated herein as defendants, aided and abetted by CHARLES CROCKARELL, who is designated herein as a defendant, did unlawfully, wilfully and knowingly carry on the busines of a distiller without giving bond as required by law

in violation of Section 5601(a)(4), Title 26, United States Code.

COUNT THREE

During the period between September 20th, 1970 and September 30th, 1970, the exact date being unknown to the Grand Jurors, in the Middle District of Tennessee, Nashville Division, and within the jurisdiction of this Court, CHARLES CROCKARELL did unlawfully, wilfully and knowing possess property, to wit: a still, condensers and a gasoline pump, intended for use in violation of the provisions of Chapter 51, Title 26, United States Code, in violation of Section 5686(a), Title 26, United States Code.

COUNT FOUR

During the period between September 24, 1970 and September 30, 1970, the exact date being unknown to the Grand Jurors, in the Middle District of Tennessee, Nashville Division, and within the jurisdiction of this Court, CHARLES CROCKARELL did unlawfully, wilfully and knowingly possess property, to wit: eight (8), more or less, butane gas condensers and two (2), more or less, high-pressure burners, intended for use in violation of the provisions of Chapter 51, Title 26, United States Code, in violation of Section 5686(a), Title 26, United States Code.

COUNT FIVE

During the period between September 24, 1970 and September 30, 1970, the exact date being unknown to the Grand Jurors, in the Middle District of Tennessee, Nashville Division, and within the jurisdiction of this Court, CHARLES CROCKARELL did unlawfully, wil-

fully and knowingly possess property, to wit: two (2), more or less, cooling tubs, intended for use in violation of Chapter 51, Title 26, United States Code, in violation of Section 5686(a), Title 26, United States Code.

A True Bill:

/s/ Mrs. James B. Fagg
Foreman

/s/ Charles H. Anderson
United States Attorney

## EXCERPTS FROM TRANSCRIPT OF TESTIMONY

(Tr. 102-113)

*Cross-Examination by Mr. Quillen*

WITNESS: MELVIN MANNERS

Q. Was any sugar used in the manufacture of whiskey? A. Yes, sir.

Q. Who used the sugar? A. Who used it?

Q. Who used it, yes, sir? A. Well, me and my brother Larry.

Q. Where did you obtain it?

Mr. Thompson: Objection, if Your Honor please, I don't see it has any relevancy whatsoever to this lawsuit as to where they got sugar to run this still.

The Court: Well, it is a matter to test the credibility. I think it is a matter competent for cross-examination.

A. Well, I got it from a man in Kentucky.

By Mr. Quillen:

Q. Where in Kentucky? A. I just got it from a man in Kentucky. He brought it to us.

Q. Where did he bring it to you? A. I think it was at the house on Eighteen when he brought it to me.

Q. And on how many occasions did he do that? A. About four or five.

Q. How much sugar did he bring? A. Well, let's see. It would be about 9,600 pounds.

Q. How much did he bring at any one time? A. 2,400 pounds.

Q. Who paid him for it? A. Me and my brother Larry.

Q. How much did you pay him? A. About $14 or $15 a hundred pounds.

Q. Now, how did you contact him in Kentucky to obtain the sugar? A. I called him.

Q. Did you know his name when you called him? A. Yes, sir.

Q. Who was the man?

Mr. Thompson: If Your Honor please, I'm going to object. It has no bearing on this case. It is designed strictly to put this man in even a worse position than he is in. Can't have any possible bearing on the case. The point that he was raising about the sugar has been dispensed with when he identified where this man came from, not even from this state.

If Mr. Quillen has got something that goes to the matter of credibility, that might be something else again, but it is nothing but a fishing expedition, any question would go to credibility no matter how remote.

The Court: Well, it pertains to the still that is the subject of the controversy here to a degree at least. I think it is all right up to now. Go ahead.

By Mr. Quillen:

Q. What was the name of that man, Mr. Manners, from whom you obtained the sugar?

The Court: I'm going to let the jury go out a minute. I've got to find out something. Members of the jury, you all can step out.

(Thereupon, at 2:25 p.m., the jury of twelve and one alternate retired from the courtroom, and in their absence the following proceedings were had, to-wit:)

The Court: Now, could I inquire of counsel for the defendant why they want to know the name of the man?

Mr. Quillen: If Your Honor please, one reason, it is my recollection at the previous trial this witness denied knowing the name of the man. I think there is a contradiction.

The Court: Well, you've already got that then.

Mr. Quillen: Further it is to test his credibility.

The Court: Well, in what manner?

Mr. Quillen: Well, to see, well, in this particular indictment, if Your Honor please, Mr. Crockarell is charged with—

The Court: (Interposing) I well know what he is charged with, Mr. Quillen. I read the indictments.

Mr. Quillen: Well, in order to demonstrate or to give my answer that under the language of the indictment, for instance, if there was no, say, if there was no distilled spirits produced, I think there might not be any offense or if there had been no, in other words—

The Court: (Interposing) Just give me that one more time.

Mr. Quillen: Well, the indictment itself is so broad that I think—

The Court: (Interposing) You don't mean that this wouldn't be an offense under 371 if they had failed to make whiskey?

Mr. Quillen: Well, there would not be any offense under these others if there had been no intent to perhaps,

if the Court please, under these other counts of the indictment.

The Court: Do you mean carrying on the business of a distiller?

Mr. Quillen: Yes, sir, or the possessing of the materials?

The Court: Intending for the use?

Mr. Quillen: Yes, sir.

The Court: I don't think the sugar has anything to do with that. Now, tell me why you want to know the name of the man, that is what I'm trying to ask you again. You already say you have a contradiction which you can exploit.

You say on the previous trial he said one thing and now he said he did know the name of the man, you already have that. What else do you need?

Mr. Quillen: Excuse me. Well, if the Court please, there is another something that I learned today from a document furnished to me that indicated that another person possibly will be called as a witness here a little later, I think he is here as a witness, was probably involved in this, especially in the sugar aspect of this distillery. But further, the indictment is so broad as this one is I think we are entitled to explore and test his credibility of the witness.

The Court: You are entitled to ask him any person to whom he sold every gallon of whiskey he made out there.

Mr. Quillen: I think we are entitled to ask him to whom he sold—

The Court: (Interposing) Well, he made some, I understand, at least he got 9,600 gallons (sic). I trust he made some before he got caught. I mean, 9,600 pounds of sugar. You are entitled to ask him all—just for the purpose of testing his credibility.

Mr. Quillen: I believe I am entitled to ask him if he made whiskey and if so what he did with it.

The Court: Do you have any law to assert, Mr. Thompson, instead of any reason, I've got plenty reasons. Don't need any of that. Need a little law.

Mr. Thompson: No, sir. Mr. Quillen needs it, too. What he is talking about, of course, we turned over to him all reports while ago. There was inquiry about a man with sugar coming into his establishment. I think that is as far as it went. As far as I know, there is no reference at all to any particular still, any distillery operation, or any moonshine. Now, that witness is going to be called and he is not a Kentucky man. The question along this line has nothing to do with that whatsoever.

You could ask this man what he had for dinner last night and that would be a test of credibility, I guess, but wouldn't have anything to do with the lawsuit. I think it is just a fishing expedition. I don't want to get in the same situation we got into before at all and I know the Court doesn't. I think he is entitled to go at least part of the way, as far as he has gone, but as far as the name of a man, it has nothing whatsoever to do with this thing.

He is trying to put this boy, punish him as much as he possibly can for what he's doing up here today. And he'll serve that purpose if allowed.

The Court: Well, I share the same opinion. I'm inclined to think Mr. Quillen, that before you ask any questions about to whom he sold a gallon of whiskey and so forth you're going to have to show me that it has some specific bearing on some evidence in the case and something, otherwise, I'm going to stop you.

Mr. Quillen: If Your Honor please, if he'll name the person perhaps to undertake to interview that person and—

The Court: (Interposing) Do you mean that is true of all persons alike who bought a gallon of whiskey from him?

Mr. Quillen: Any person he might name.

The Court: I'm not going to permit questions of that sort. I think it has one purpose. This man is testifying against a defendant and he is a law violator himself. You know and I know that under opprobrium one law violator testifying about alleged offense of another man, particularly one who may occupy some position, unless you can show me some specific reason for it, I'm not going to permit anything further.

Mr. Quillen: Will I be permitted to make the record by showing the questions that I would have asked?

The Court: All right, go ahead.

By Mr. Quillen: (Outside Presence of Jury.)

Q. Mr. Manners, what is the name of the person from whom you obtained any sugar that was used in this distilling operations?

Mr. Thompson: As I understand, this is going to be reading of a list of questions for the record?

The Court: That is my understanding.

Mr. Thompson: All right. I don't think we need any hesitation between any one of them.

Mr. Quillen; All right. I would like for the record to show that then this witness—

The Court; (Interposing) Hasn't answered.

Mr. Quillen; Has not answered and I move the Court to instruct the witness to answer.

The Court; Well, I do not so instruct him.

Mr. Quillen; All right, sir.

By Mr. Quillen;

Q. Mr. Manners, how much whiskey was manufactured on this particular distillery?

The Court: I think that is a proper question. I see nothing wrong with that.

Mr. Quillen: Well, may I just go ahead and let him answer that?

The Court: All right, you can do that before the jury if you want to.

Mr. Quillen: Well, I would like to go on if he will answer that, it will make more sense.

The Court: All right, how much whiskey did you get made?

The Witness: I don't know exactly how many gallons, but it would be about a thousand gallons.

By Mr. Quillen:

Q. About a thousand gallons out of 96,000 pounds of sugar? A. Ninety-six hundred pounds.

The Court: Ninety-six hundred pounds, you got that, didn't you?

The Witness: Ninety-six hundred pounds.

Mr. Quillen: Ninety-six hundred pounds. I beg your pardon. Ninety-six thousand, that would've been too much. Sorry.

By Mr. Quillen:

Q. There was whiskey, the thousand gallons, Mr. Manners, did you sell that whiskey yourself? A. Well, yes, sir.

Q. Did you deliver any of it to your father? A. No, sir.

Q. Did you sell it all yourself? A. Well, I done most of the business deals.

Q. All right. To whom did you sell any of the whiskey, any of the one thousand gallons? Can you give me the name of any person to whom you sold it? A. No, sir, I just can't answer that.

Q. You say you can't answer it. Why can't you answer it?

Mr. Thompson: If Your Honor please, that is another one of the same area we talked about.

The Court: I'm going to sustain it for the time-being. Go ahead.

Mr. Quillen: All right. Well, I'm going to take it up again. It is our contention that a truthful answer might further reflect upon the truthfulness of other witnesses who have been and may be called. That is, that if this witness is compelled to answer fully—

The Court: (Interposing) Well, at this time I'm not going to compel him. I will take it under consideration, give it some further thought. If I think it is in the ends of justice to let these questions be answered later in the trial, I will direct that the witness answer.

Mr. Thompson: If Your Honor please, at this time I request counsel for the defense to give us the name of this person who he keeps referring to but—I know who it is, but I think it ought to be in the record to get it pinned down to show any relationship or any lack of relationship.

Mr. Quillen: Do you mean as to who was involved? His father, Lim Manners, that is one of them.

The Court: I think it is obvious to me who he is talking about.

Mr. Thompson: He said going to be called as a witness.

The Court: He said who has been or will be. The defense is attempting to show and insinuated up to now that Lim Manners intending to be the kingpin of this operation and had not lost track of the still the night he dropped it off at his camp and let them go on with it. I recognize it as a theory. I say, I'm going to reserve judgment on it now, though, at the moment I'm not going to direct he answer. I may later in the trial direct that he answer if I deem it serves the interests of justice.

Mr. Quillen: If Your Honor please, that is the principal tactic of the defense that Mr. Crockarel has. What the testimony we've heard has been of a nature that it could in a sense be canned. The only way that he has of attacking the credibility or impeaching any of these witnesses is by pursuing a course of cross examination in an area where they perhaps have not had any opportunity to get their heads together on it.

The Court: Well, that is one theory of what the defendant could do. I might have another theory, Mr. Quillen, but we won't discuss that in open court for the record. Let the jury come back in and we'll proceed with the case.

Mr. Quillen: I take it then I'm instructed not to ask the question about who he sold the whiskey to?

The Court: That is exactly correct.

Mr. Quillen: Or who he bought the sugar from?

The Court: That is exactly correct.

* * *

(Tr. 137-162)

*Colloquy*

Mr. Quillen: Further, if the Court please, I have asked the court reporter, Mr. Hamlin, to obtain for me and I will ask him to transcribe the testimony, the former trial of Melvin Manners or at least portions of it on cross examination. I think his testimony at that time not only was materially different from what it is today, but that the rulings of the Court actually were different from, at least I was not—government was not sustained earlier and it is now under advisement.

If the Court should rule against me, then the ruling of the Court would be I believe different from what it was before, at least that would be my interpretation of it.

In any event, I do move to be allowed to file the court reporter, Mr. Hamlin's transcription of the cross examination of Melvin Manners on the former trial in support of my motion to be allowed to further cross examine him. I want to preserve the record with it and have it in the record in the event of any review.

The Court: All right, sir.

Mr. Quillen: Mr. Hamlin would get that available, can you get it by Thursday?

The Reporter: Yes, sir.

Mr. Quillen: That is all I have.

The Court: All right, if nothing further, court will be in recess.

Mr. Quillen: I want to make a motion for judgment of acquittal.

The Court: You want to make it now?

Mr. Quillen: I will make it now.

The Court: All right, go ahead.

Mr. Quillen: I now move Your Honor to grant a judgment of acquittal as to the defendant to all counts under which he is charged and let me scan these overt acts. I think, of course, with respect to the Fifth Count, if Your Honor please, should be granted judgment of acquittal on that. There's not any sufficient evidence in this record to show that Mr. Crockarell ever possessing any cooling tubs intended to be used in violation of Chapter 51.

The Court: Well, I think the motion is without foundation on all counts. It will be denied. All right. If nothing further court is in recess.

(Thereupon, at 3:40 p.m., Tuesday, May 30, 1973 court was adjourned until Thursday morning, June 1, 1972 at nine o'clock.)

SECOND DAY OF TRIAL

THURSDAY, JUNE 1, 1972

NINE O'CLOCK A.M.

Pursuant to adjournment of court on Tuesday, May 30, 1972, court was in session and the jury of twelve and one alternate remained excluded from the courtroom, and in their absence court was in session and the following proceedings were had, to-wit:

The Court: Are there any preliminary matters? Call the first case.

(Thereupon, the Court transacted other business and then in this case the following proceedings were had, to-wit:)

The Court: Mr. Howell, are you all ready?

Mr. Howell: Yes, sir.

The Court: All right, get Mr. Quillen in, then. Defendant will proceed. (Respite.)

Now, for the record, let me repeat what I have informed counsel at chambers. That I have considered further the question of whether or not additional cross examination of the witness Melvin Manners should be permitted in connection with certain questions which were asked to him with reference to where he purchased sugar for the operation of the still which is part of the subject matter of this action and his sales of thousand gallons of whiskey.

His testimony was that he bought it himself, the sugar and that he made the sales of the thousand gallons. He is a nineteen year old boy. I think that the defendant has got to be allowed to cross examine him further with reference to those matters because it does go to his credibility. It may not have a whole lot of bearing on whether he is telling the truth about the main issue here but I think it would be reversible error not to permit it. I, therefore, am going to permit it.

Are you going to proceed with that initially, Mr. Quillen, or is there anything further the government wants to do in connection with that witness?

Mr. Thompson: No, sir.

The Court: All right, let the jury come in. You can bring that witness to the stand, Melvin Manners.

(Thereupon, the jury of twelve and one alternate returned into the courtroom, and in their presence the following proceedings were had, to-wit:)

The Court: Members of the jury, although the government stated at the conclusion of the day on Tuesday that it had completed its case, I have this morning made a ruling that permits additional cross examination of the government witness, Melvin Manners. And, therefore, this will be a part of the government's case in chief. You may have a seat, sir.

MELVIN L. MANNERS,

a witness called at the instance of the plaintiff, returned to the witness stand on Thursday, June 1, 1972, and was examined and testified further as follows:

*Further Cross-Examination by Mr. Quillen*

Q. Mr. Manners, when you testified here day before yesterday, I believe that you answered that you purchased some sugar, you purchased some corn, what else was there, if anything, that you purchased for use in that distillery? A. Jugs.

Q. Was there anything else? A. No, sir.

Q. In what manner did you ferment the mash? What was it fermented in? A. What do you mean?

Q. What kind of fermenters were used to make the mash in? A. Barrels.

Q. How many barrels was that? A. Forty-eight.

Q. Where did you obtain them? A. From the same man.

Q. From what same man? A. The man that I got the sugar from.

Q. Now, did you buy the barrels? A. Yes.

Q. How much did they cost you? A. Well, they was kindly in a trade.

Q. Beg your pardon? A. They was kindly in a trade.

Q. What kind of a trade? A. Trade whiskey for the barrels.

Q. All right, what allowance was made, though, for the barrels? A. Five dollars apiece.

Q. $5.00 each? A. Yes, sir.

Q. Now, how did you contact the man that you got these barrels from? A. Same way I contacted him at other times.

Q. And how was that? A. By phone.

Q. Was that a local call or long distance call that you made? A. Long distance.

Q. Now, do you know the name of the man from whom you bought those barrels? A. Yes, sir.

Q. Is that also the man from whom you bought the sugar? A. Yes, sir.

Q. What is the name of the man that you bought these barrels from? A. I just can't answer that.

Q. Do you know it? A. Yes, sir.

Q. Is this man the same man that you sold the whiskey to? A. Yes, sir.

Q. Did you sell all of the whiskey to that same man? A. No, sir, not all of it.

Q. How much did you sell to this particular person? A. The most part of it.

Q. Beg your pardon? A. The most part of it.

Q. Well, can you estimate it in terms of gallons how much you sold to the man from whom you got the sugar and the barrels? A. I really don't remember.

Q. How many people altogether did you sell whiskey to that was made on that still? A. I don't remember that either.

Q. Was it more than two? A. Yes, sir.

Q. Do you remember selling to as many as three people or four people? A. Yes, sir, it was quite a few people. It would be more than two or three.

Q. Beg your pardon? A. It would've been two or three.

Q. Where did you make the sales? A. Where?

Q. Yes. A. Different places.

Q. And did you go someplace else to sell the whiskey or did the people come to you?

The Court: Now, are we talking about the main purchaser or are we talking about other purchasers, Mr. Quillen?

Mr. Quillen: Well, any that he has made.

The Court: Let's confine it. What about the man who bought most of the whiskey? You say he is the one who bought most of the whiskey and he is the one you bought the sugar and the barrels from, where did you make your sales to him?

The Witness: He come to us.

By Mr. Quillen:

Q. And where was that? A. It was just down in Stewart County.

Q. Well, any particular place in Stewart County? A. Yes, sir, it would be, used to call that Hurricane.

Q. Beg your pardon? A. Between Hurricane and Leatherwood.

Q. What is between Hurricane and Leatherwood? A. It is a blacktop road that goes from McKinnon to Dover.

Q. Does anyone live there? A. There does over in a place named Possum Hollow, but it wasn't done in that part. It was done out on this hill part that has got a ridge road down it and there is a road that comes by where we had the still. You just cross this blacktop and there is another dirt road that goes down another ridge and that is where the deals was handled.

Q. That is where he would come to to get the whiskey, is that right? A. Yes, sir.

Q. Now, what was the name of that man? A. I just can't tell that.

Q. You do know his name, don't you? A. Yes, sir.

Q. Did you know his name when you testified here back in January of last year or this year? A. I don't know whether I did. No, I don't believe I did.

Q. You didn't know his name at that time? A. No, sir, I don't think so.

Q. But yet you made the telephone calls to him before then, is that correct? A. Yes, sir.

Q. Then you, I take it, have learned his name since then? A. Yes, sir.

Q. All right, have you seen him since then? A. Well, yes, sir.

Q. Where have you seen him to learn his name? A. Well, after that he come back and tried to buy more whiskey and stuff.

Q. Who told you his name? A. Ted Dugger.

Q. Ted Dugger? A. Yes, sir.

Q. Who is Ted Dugger and where does he live? A. He used to live over at McKinnon but he's dead now.

Q. When did he die? A. About three years ago.

Q. Ted Dugger is the man who told you the name of the man that you sold this whiskey to? A. Yes, sir, that is how I got in touch with the man.

Q. Beg your pardon? A. That is how I got in touch with the man.

Q. And he died three years ago? A. Yes, sir.

Q. Now, when was it he told you the name of this man that you had been dealing with for barrels and sugar and selling whiskey to? A. When was it?

Q. Yes, when did Ted Dugger tell you that name? A. He told me before he died, about four years ago, I'd say.

Q. Well, then, you did know his name back here in— A. (Interposing) Well, no, he didn't tell me his real name. He just used some kind of name like Slick or Lege or something like that.

Q. Like what? A. Slick or Lege or something like that. It wasn't his real name.

The Court: The question is, when did you find out what his real name was?

The Witness: Oh, about a couple of months ago.

By Mr. Quillen:

Q. From whom did you find out his real name? A. From him.

Q. Beg your pardon? A. From him.

Q. From the man himself? A. Yes, sir.

Q. Well, I ask you again, who is that man? A. I just can't answer that.

Mr. Quillen: May it please the Court, I move that the witness be directed to answer the question.

The Court: Mr. Manners, you'll have to answer the question. I know of no reason why you should not. Go ahead.

The Witness: I just think it is self-incrimination.

The Court: No, self-incrimination is not involved. Go ahead and answer the question.

The Witness: I just think it is self-incrimination.

The Court: Members of the jury, you'll step out, please.

(Thereupon, the jury of twelve and one alternate retired from the courtroom, and in their absence the following proceedings were had, to-wit:)

The Court: Ordinarily when I have a witness on the stand who claims the privilege against testifying on the grounds of self-incrimination I ask him if he has a lawyer to talk with. This man is being—was presented by the government. Has the government advised him with reference to this matter?

Mr. Thompson: I've generally advised him, Your Honor, of the right against self-incrimination, Your Honor.

The Court: But has he been specifically advised with reference to this question there is no right of self-incrimination?

Mr. Thompson: I told him that if it was presented at the time His Honor would rule on it and I didn't know what His Honor would say at the time.

The Court: Well, do you think I should appoint an attorney for him since apparently you think there might be a privilege involved.

Mr. Thompson: Your Honor, my personal opinion is no. My personal opinion is that granted what he has already said that he has already admitted the primary act involved. The only question would be whether or not in any subsequent prosecution the name of that individual would substantially enhance the prosecution. In one sense it would. On the other hand, he has already admitted the sale.

The Court: Well, he has not only already admitted the sale but he has already been convicted in the court for the—in connection with this operation.

Mr. Thompson: Yes, sir, I believe making and fermenting mash.

The Court: Well, I remember that and that was a mistake I made I guess in letting the government dismiss a couple of counts, I guess is what happened, because he had already admitted the full complicity in the whole thing. So, there is no question of self-incrimination in connection with anything insofar as that particular still, its sales, its purchases, its operation, or anything else is concerned.

I, therefore, rule that there is no question of self-incrimination involved and I direct you, Mr. Manners, to answer the question when I bring the jury back in. All right.

(Thereupon, the jury of twelve and one alternate returned into the courtroom and in their presence the following proceedings were had, to-wit:)

The Court: All right, Mr. Manners, you'll answer the question.

The Witness: I just can't answer it.

The Court: Mr. Manners, you were directed by the Court to answer the question. Will you answer the question now or not?

The Witness: I just think it is self-incrimination.

The Court: I've ruled that no element of self-incrimination is involved in this and I direct you now to answer the question. Ask it one more time, Mr. Quillen.

The Witness: I just think it is self-incrimination.

The Court: Members of the jury, I'll have to excuse you then.

(Thereupon, the jury of twelve and one alternate retired from the courtroom and in their absence the following proceedings were had, to-wit:)

The Court: I'm going to recess the case for about ten minutes. During that ten-minute period I shall expect the counsel for the government to talk with the witness. If he desires to talk with them. I expect counsel for

the government to advise me if he wants counsel other than the government. I think everybody realizes that it is going to be necessary in the absence of something to commit the witness for contempt for failure to answer the question. I do not like to proceed that way until all the avenues have been explored and traveled.

So, I'm giving you a few minutes to see what you can do with reference to it before I go that far as to commit this witness to the custody of the Marshal until he answers the question. All right, court will be in recess. What is the question that we have? Do we have a question, Mr. Thompson? I notice there was some communication to you there. I didn't know whether you were suggesting something you should say to me or not.

Mr. Thompson: No, sir. No, sir.

The Court: All right, court is in recess.

(Thereupon, at 9:33 a.m., court was in recess.)

AFTER RECESS.

(Thereupon, at 10:35 a.m., same day, court was in session and the jury of twelve and one alternate remained excluded from the courtroom and in their absence the following proceedings were had, to-wit:)

The Court: Mr. Thompson, while we're waiting for the defendant, can you see about getting the witness in here, too?

Mr. Thompson: Yes, sir. (Respite. Witness Melvin Manners on the witness stand and in the absence of the jury the following proceedings were had, to-wit:)

The Court: Now, let the record show that at the recess I called Mr. James L. Roberts, a member of the Bar of this court, and I'm requesting Mr. Roberts to advise with the witness, Melvin Manners, with reference to his refusal to answer a question which was posed to the wit-

ness by counsel for the defendant. The witness raised the issue of self-incrimination and I have ruled that on the basis of the record as it stands now there is no self-incrimination involved.

For the purposes of Mr. Roberts' understanding of the present posture of the matter, let me make this statement. The witness has testified on cross examination among other things that in connection with the operation of the still allegedly purchased by him and his father from the defendant, he bought 9,600 pounds of sugar and an amount of corn, some one-gallon jugs, for the purpose of setting this still into operation.

He has testified that he got some 48 barrels from the same man from whom he got the sugar and he has also testified that the man from whom he got the sugar was his principal customer in the sale of the whiskey.

He has testified fully as to the operation of the distillery, asserting that he made about a thousand gallons, roughly a thousand gallons of whiskey and that he sold the whiskey for approximately $5,000 or $5.00 a gallon. He stated that he had an arrangement with the supplier of the sugar and the barrels so that he did not have to pay for the barrels at the time of their delivery, but they were credited at the rate of $5.00 per barrel in connection with the sale of the whiskey.

As I stated, he has heretofore entered a plea of guilty in this court to a charge of making and fermenting mash at this distillery being involved. Other counts were dismissed on motion of the government.

However, the other counts charging other violations of the Internal Revenue laws in connection with that operation are no longer a matter of self-incrimination since the witness has testified fully already without objecting thereto, to manufacturing whiskey and doing all the things

that would constitute the essential elements of the other offenses with which he was charged.

The question posed to him was, what was the name of the man from whom he purchased the sugar, obtained the barrels, and to whom he sold the whiskey. He has declined to answer that question, first just stating that he couldn't answer the question, but finally stating that he thought it was self-incriminating.

The Court could see no basis for any self-incrimination in the question and considered it proper in view of the latitude in cross examination which had been allowed to the defendant because of the question of the credibility of this witness and a previous witness for the government seemed to be germane to the action.

I have advised the witness that his refusal to answer would constitute contempt and that it would be necessary to commit him in the absence of an answer.

Before proceeding any further, however, I wanted him to have the benefit of counsel to talk with him about it and I might say that at recess and in chambers the Assistant United States Attorney has related a conversation had with him by the witness in which he posed a possible—he posed a hypothetical question which he indicated was really the basis for his claim of self-incrimination.

I will leave it to you, now, Mr. Roberts and we'll take a recess.

Mr. Roberts: If the Court please, I do want to talk to him but I think I can make this statement as a preliminary matter. The Court will recall that almost this same situation arose when this case was previously in progress and I talked to this man at that time and I advised him at that time that he did have a right to refuse to answer and although we didn't get that far in our discussion in here, it was my opinion at that time because

of other things he had told me that even if the government could have given him complete immunity and even if he had had it at that time, that there were other factors involved that would give him the right to refuse to testify.

The Court: Well, there may be other factors involved, but on the record he has disposed of most of them such as his previous freely advanced testimony of everything that could possibly be involved in connection with this particular still.

Mr. Roberts: I understand that, Your Honor, but—

The Court: (Interposing) Which was not the stiuation before.

Mr. Roberts: I know it is not the situation before, but I think the grounds that I mentioned to him still exist and I don't know whether he mentioned it or not.

The Court: Well, he hasn't mentioned anything except he thought it was self-incrimination. Therefore, I want you to talk with him and if he has a ground, and if there is, if he actually believes, I think the test for self-incrimination is whether the witness is actually and sincerely of the belief that there is possible incrimination.

Mr. Roberts: The point I wanted to make is, I think that he is probably taking the position that he is because of the advice I gave him previously.

The Court: It may be and maybe after talking with him and after my giving you the present posture of the case your advice might be somewhat different. That is the reason I'm giving it to you.

I will state at the previous trial that he testified as I recall that he did not know the man from whom he bought the sugar. That was as far as the other—he now states that he has learned his name and before that he knew who he was but knew him only by some nickname, the exact nickname being somewhat indefinite from the testimony of the witness.

But that within—that a couple of months ago since the previous trial he learned the real name of the man, learned it from the man himself.

Mr. Roberts: All right, sir.

The Court: All right, we'll be in recess.

(Thereupon, at 10:45 a.m., same day, court was in recess.)

AFTER RECESS.

(Thereupon, after recess, and at 11:10 a. m., court was in session and the jury of twelve and one alternate remained excluded from the courtroom and in their absence the following proceedings were had, to-wit:)

(Witness Melvin Manners on the witness stand.)

The Court: All right, Mr. Roberts.

Mr. Roberts: If the Court please, I am still of the opinion that this man has a right to refuse to answer the question put to him. If I may go a little more in detail as to what I was saying previously.

When I was asked to advise this man when the case was set before and you reached somewhat this same position, I consulted with him and on the basis of what the Court told me in open court, plus what he told me in private conference, I advised him that he had a right to refuse to answer on two separate and distinct grounds.

One of those was that the government had not and could not have given him immunity with regard to the testimony about this particular still.

When we came back into court as I recall, all I announced to the Court was that I had advised him that he had a right to refuse to testify. Your Honor then concurred in—and reviewed the matter with regard to immunity and very correctly pointed out that you were the only one who could grant that immunity and even then

only certain types of cases and that had not been done and could not have been done in this case.

There never was any discussion in court as to the other ground.

Now, I can readily understand why this young man has some difficulty making his point. It is difficult for a lawyer. Because he is in this position. To answer this question would tend to incriminate him of a separate and distinct offense other than that involved with the still that is in question here or the offense for which he was previously arrested. To go any farther in explaining that, would be doing just exactly what he has got a right to refuse to do.

I might add that I completely agree with the Court that on the basis of the testimony he has already given he would have waived any immunity as to the operation of this particular still.

The Court: Well, I think under the circumstances the only thing I can do is permit him to claim the privilege. I must raise the question here for subsequent determination as to whether under the circumstances this doesn't constitute a violation of conditions of probation under which he is now serving by grace of the Court. But that is a matter to be determined later.

So, I will permit him to claim his privilege in connection with the particular question that was asked him by counsel for the defendant. Are we ready to proceed? Mr. Roberts, I appreciate your services. I don't know that any other questions are going to arise here, but I don't know the additional scope of cross examination. So, could you wait around just five or ten minutes? Not more than that I don't know.

Mr. Roberts: All right, sir.

The Court: Let the jury come in.

Mr. Quillen: I would like to make a motion at this time.

The Court: Hold it a minute.

Mr. Quillen: May it please the Court, on behalf of the defendant and in announcement of Your Honor, I now move that the entire testimony of this witness be stricken from the record.

The Court: No. The motion is denied.

Mr. Quillen: Now, in further—in support of that motion I wish to file a copy of the official transcript of the testimony of this witness given on Wednesday, January 12th, 1972 at Nashville and further I'm filing this for the record only in support of the motion that I filed at the beginning of the trial, that is, that the government be precluded from calling any witnesses—

The Court: (Interposing) Well, it can be made a part of the record. The motion is denied.

Mr. Quillen: Further in support of the motion to strike his testimony in its entirety. All right.

The Court: All right, it can be made a part of the record. Let the jury come in. Hold it, Mr. Kemp. Mr. Kemp, hold it. Hold it just one second.

I am going to advise the jury that I am permitting the witness to claim the privilege of self-incrimination on the grounds that his answer might incriminate him in some other offense other than the one involved in the operation of this distillery. I think they're entitled to know that and it has not been brought out.

(Thereupon, the jury of twelve and one alternate returned into the courtroom, and in their presence the following proceedings were had, to-wit:)

The Court: Members of the jury, in your absence a hearing has been had on the question of whether or not this witness should be permitted to claim his privilege against self-incrimination under the Fifth Amendment.

Let me advise you very briefly that the Constitution of the United States provides that no person shall be forced to give evidence against himself. That is in essence a shorthand form statement of the privilege against self-incrimination.

After a hearing, I am permitting the witness to claim that privilege on the basis of his stated fear that answering the question posed by defense counsel would possibly subject him to other criminal actions in matters unrelated to the operation of this distillery. In other words, some other criminal offense. All right. You may continue.

Mr. Quillen: I have nothing further with this witness.

The Court: All right, does the government have anything further?

Mr. Thompson: No questions.

The Court: You can step down. Now, I assume that that, of course, does conclude the government's case?

Mr. Thompson: Yes, sir.

* * *

(Tr. 294-346)

*Cross-Examination by Mr. Quillen*

WITNESS: LIM MANNERS

Q. Now, Mr. Manners, you have been interviewed several times by federal agents, haven't you? A. Well, not a whole bunch of times, Mr. Quillen.

Q. Well, they've talked with you a good many times and have reduced some of your statements to writing, is that correct? A. Now, just what do you mean?

Q. Well, statements that you made to these officers, they were copying it down on some paper what you were saying? A. Well, I—he never did in front of me, Mr. Quillen. He might did somewhere else.

Q. Well, let me ask you, where is Lane Hollow? A. Lane Hollow? That would be—Lane Hollow I believe would be about six or eight miles from my camp on down, they call it Bomar Hill in the mouth of Leatherwood Creek, Mr. Quillen.

Q. Now, Leatherwood Creek, is that where—well strike that.

Let me ask you this, Mr. Manners, did you make any statement to any officer "I told the Sheriff if there was any way I wanted to load every damned thing I got here. That was my still that we had in the Lane Hollow." A. No, no, I didn't say that to him, Mr. Quillen.

Q. You didn't say that to any officer? A. No, I just didn't, Mr. Quillen.

Q. Did you ever have any still in the Lane Hollow? A. Never did in my life.

Q. And being further interviewed did you make this statement to any of the federal officers, "We loaded this equipment on our truck. I then asked the Sheriff if I could have my cooling tubs back." A. No. No, I didn't do that, Mr. Quillen.

Q. That they held a thousand gallons each and I needed them bad? A. No, I didn't tell him that either. But, Mr. Quillen—

Mr. Quillen: (Interposing) Excuse me. (Respite.)

Q. Mr. Manners, this still where Joseph Kent, I think Joseph Kent was arrested there at the still, and Melvin Kent was arrested later, and being identified as having been there, was that your still? A. No, sir, I never seen the still, Mr. Quillen. Didn't know anything—

Q. (Interposing) Was it Melvin's still or Larry Neal's still? A. No, it just wasn't, Mr. Quillen.

Q. Did you know anything about it whatsoever? A. Not a thing on this world's earth, Mr. Quillen, I didn't.

Mr. Quillen: That is all at this time, if the Court please. I move, though, to—

The Court: (Interposing) Well, the government understands that they'll furnish you the identity of the person who prepared that document that the government has furnished to you. All right.

Mr. Thompson: Your Honor, I don't have any further witnesses—any further questions of this witness or any other witnesses. If I could have a few moments in order to get the information we need here.

The Court: Well, if you think you can do it in a few moments, I would like to conclude the testimony this afternoon.

Mr. Thompson: This is all the presentation we have.

The Court: Well, I'll take a very brief recess. You see whether you can or not. Otherwise we're going to have to go over to tomorrow and I have some other matters set at nine in the morning so this case is going to have to go over to ten at least. Do you think you can do it immediately?

Mr. Thomspon: Your Honor, if I can do it, I can do it immediately. Otherwise I'll have to do some further—

The Court: (Interposing) I think it would be better to recess the case and you see what you can do this afternoon so we'll know what we're going to have to do in connection with that matter in the morning.

Mr. Quillen: Then I want to ask leave of the Court to call this witness McMillan if I may, in the morning.

Mr. Thompson: Is there any need for any of the other witnesses for each side to be here? May they be excused? As far as I'm concerned they can. (Respite.)

Mr. Quillen: I don't know at this time that I will want anybody other than perhaps whoever prepared this document, that is, anyone who has already been called.

The Court: Well, as far as your own witnesses are concerned, they can all be excused as far as you know?

Mr. Quillen: Yes, sir.

The Court: What about the government witnesses? Anybody you want kept?

Mr. Quillen: No, we won't have any witnesses that I know of at this time. I don't think we'll have any more.

The Court: All the witnesses can be excused with the exception of this witness here who might have to be questioned further, is that right, everybody except Mr. Lim Manners, is that right?

Mr. Thompson: Yes, sir.

Mr. Quillen: Yes, sir.

The Court: All right, the other witnesses may be excused. Members of the jury, we're going to recess until tomorrow. As I say, I do have some other matters set at nine o'clock. If I work real hard I think I can get through by ten o'clock, but you all won't have to be here at ten. You go directly to the jury room. The Marshals will tell you how to do that. Remember the previous instructions I have previously given you with reference to discussing the case, with reference to reading about it, which means don't read about it and don't discuss it and I will see you in the morning. Court is in recess.

(Thereupon, at 3:50 p.m., Thursday, June 1, 1972 court was in recess until tomorrow morning at ten o'clock.)

THIRD DAY OF TRIAL

FRIDAY, JUNE 2, 1972

TEN O'CLOCK A.M.

Court met pursuant to adjournment on yesterday, and the jury of twelve and one alternate remained excluded from the courtroom, and in their absence the following proceedings were had, to-wit:

The Court: Let me make this statement for the record. Counsel can amplify it if they so desire.

Among the material furnished to defense counsel by the United States Attorney as being covered by the Jencks Act was a four-page document, a Xerox copy of which will be made a part of the record in the case. The four-page document is without identification as to what federal agent may have prepared it. It is indicated in it in some portions of it, that it is a statement of one Lim Manners, who has testified in this case, part of it is in the first person. Upon inquiry being made by counsel for the defendant on cross examination of Lim Manners yesterday, he denied as being true certain statements that apparently are attributed to him in this purported Jencks Act document.

Subsequently I was informed by the Assistant United States Attorney, Mr. Thompson, that he had made inquiry as to the source of this document since he had not known what agent had prepared it, if any agent had done so, and he advised and he has also advised counsel for the defendant that the document was prepared according to his understanding by Agents Rollins and Giles of the Alcohol, Tobacco and Firearms Division of the Treasury Department, and that according to his information it was prepared by these agents, although there is no indication that they did so prepare it, from a tape recording which had been made by one Clifton Spires, who was acting as an informant for the government.

I have further been informed and so have counsel for the defendant that the United States Attorney's office is informed that the tape recording is no longer available and was destroyed.

Upon these matters coming to my attention a short time ago, I directed the Marshal's office to determine if Clifton Spires, the one named as the source of the infor-

mation in this document, was present and I advised counsel that I was going to conduct a hearing in connection with this matter. It is my understanding that Clifton Spires is present in the courtroom and I would propose at this time to conduct an inquiry of him in connection with the document that I have here.

I realize that there are possibilities, of course, that he should confer with counsel before he undergoes interrogation and I would ask Mr. Spires if he is present to come forward please so that I can ask him if he wants counsel.

(White male at the bar.)

Examination by the Court:

Q. Now, Mr. Spires, you can just stand right there. You've heard the preliminary statement which I've made. Before you are interrogated with reference to this matter, do you want to talk with an attorney? A. (Mr. Spires.) Yes, sir.

Q. All right, sir, you may talk with an attorney but you may not talk with any attorney connected with this lawsuit. Can you employ an attorney? A. Well, Judge, I want to forget it then.

The Court: No, sir. No, sir. We'll not forget it. I ask you do you have money with which to employ an attorney? If you tell me you would prefer not to spend your money, that you have a lawyer you would like to talk with, but he is connected with this lawsuit, I will appoint another lawyer to talk with you, but I do not think it is proper for you to discuss this matter while you're under interrogation with an attorney who is involved in this lawsuit. But I will appoint a lawyer to represent you, confer with you, advise you of your rights.

A. O.K.

Q. Is that what you want me to do?

A. Yes, sir.

The Court: All right, this means necessarily a recess. I specifically instruct counsel for both sides, all government agents, and everyone else who is in this courtroom at this time, not to talk with this man at all until you are given permission to do so by the Court. I'll take a brief recess until I can see if I can get an attorney to come over and talk with him.

Mr. Quillen: May it please the Court, I would further specifically request that that order include any member of the Manners family talking with him.

The Court: It would include all witnesses, all members of the Manners family, everybody else connected with it. I'm instructing you, Mr. Spires, not to talk with anyone except the attorneys until I conduct an inquiry into this matter and I'm instructing everybody else it would be contempt of court to attempt to talk with this man until he has talked with his attorney and we've taken such further proceedings as appear proper in the premises. All right.

Mr. Quillen: May I state this further, if the Court please. I now request Your Honor to determine if insofar as it may be, if this tape, that is, the tape which has been reported to have no longer been available to determine the identity of the persons who destroyed it and if—

The Court: (Interposing) That will come up later, Mr. Quillen, and I will conduct such inquiry as I deem proper in that matter, but I'm not going to do that preliminarily.

Mr. Quillen: The only thing is, my understanding from—that it has been destroyed by agents of the government, that is, Mr. Giles or Mr. Rollins or under their direction.

The Court: That is my understanding. If the government wants to supplement information with reference

to that they may do so. Is that your understanding, Mr. Thompson?

Mr. Thompson: Yes, sir.

The Court: By which one or by both?

Mr. Thompson: Mr. Rollins.

The Court: Mr. Rollins destroyed the tape?

Mr. Thompson: Yes, sir.

The Court: All right. Court will be in recess.

(Thereupon, at 10:50 a.m., court was in recess.)

AFTER RECESS.

(Thereupon, at 11:40 a.m., same day, after recess, court was in session and the jury of twelve and one alternate remained excluded from the courtroom and in their absence court was in session and the following proceedings were had, to-wit:)

The Court: Let me make this statement for the record. I've asked Mr. Robert S. Brandt, a member of the Bar of this Court, to talk with Mr. Spires. Mr. Brandt has come down. I have furnished him with a copy of a transcript of the statement made by me in court with reference to this matter. And also furnished him with a copy of the purported Jencks Act statement.

He has just arrived. Obviously it is going to take him some time to review material and to talk with the man. I see no point in this jury having to sit back in there for an hour or so while we're waiting on this matter. I indicated to Mr. Brandt that I thought we could take up the hearing about one or shortly thereafter and go on with the trial as soon thereafter as possible.

I propose at this time to bring the jury in and tell them that we've run into some snags this morning that have caused some delay and excuse them until 1:45. Does anybody have any objection to that? All right.

(Thereupon, the jury of twelve and one alternate returned into the courtroom, and in their presence the following proceedings were had, to-wit:)

The Court: You all need not get back in the box. Just come out from here, Mr. Ragsdale and others do that, too, and I will talk with you a minute.

You all just come on out here in front and let me tell you something. You won't have to sit down.

Ladies and Gentlemen of the jury, we have obviously had some delays this morning and I've been worrying about you all back there, but I understand you have had coffee and honey buns so maybe you're in better shape than the Court is.

There is going to be some additional delay in the matter, so I'm going to let you all go and you can have a long, long lunch hour. But I will need you back at 1:45. I hope by that time we'll have completed everything in view of completing the case fairly expeditously. That is the best I can see. So, with the previous instructions that I've given you, you will be excused now until 1:45.

(Thereupon, the jury of twelve and one alternate retired from the courtroom, and in their absence the following proceedings were had, to-wit:)

The Court: Court is in recess until about 1:15. One-fifteen, I guess.

(Court in recess.)

AFTER RECESS.

(Thereupon, at 1:25 p.m., same day, after recess court was in session and the jury of twelve and one alternate remained excluded from the courtroom, and in their absence the following proceedings were had, to-wit:)

The Court: All right, are we ready to proceed? Mr. Brandt, have you had an opportunity to talk with Mr. Spires?

Mr. Brandt: Yes, I have, Your Honor.

The Court: Is he ready to be interrogated with reference to this matter?

Mr. Brandt: Yes, sir, I think so.

The Court: All right. Let him come around.

The Clerk: Will you raise your right hand, please? (Witness sworn by the Clerk.) State your full name, please.

The Witness: Clayton Spires, Sr.

The Clerk: Have your seat, please.

The Court: I might advise counsel at this time, both sides, that I don't know whether either party expects to call this man as a witness. But it would be my thought that he possibly could be called and might well be called by the Court in view of the circumstances.

Examination by the Court:

Q. Now, Mr. Spires, did you in the capacity of an informant for the Alcohol, Tobacco and Firearms Division agent or agents, make a tape recording of a conversation with Lim Manners? A. I made a tape recording, Your Honor, but I wasn't an informant for the Bureau.

Q. All right. You made a tape recording of a conversation with Lim Manners, is that what your're saying? A. Yes, sir. But I was not no informant.

Q. Did you record, did you keep that tape recording or what did you do with it? A. I kept it for a while.

Q. And then what did you do with it? A. I give it to Mr. Rollins and Mr. Giles.

Q. Who are agents for the AT&F, is that right? A. Yes.

Q. You gave it to them? A. (Witness nods head up and down.)

Q. Have you examined a statement which has been made a part of the record here, a four-page document

that I was advised was prepared on the basis of that tape recording, have you examined it? Have you had an opportunity to read it? A. No, sir.

Mr. Brandt: We've discussed it, if Your Honor please.

The Court: You've discussed it with him item by item, Mr. Brandt?

Mr. Brandt: No, not precisely because for the simple reason there seems to be a lot in that that this man doesn't know about.

The Court: Well, hand it to me. You haven't read this at all?

The Witness: No, sir.

Mr. Brandt: As a matter of fact, if Your Honor please, I had a difficult time relating the statement, that statement to him, his whole involvement in this thing.

The Court: Well, let me see. Is it the government's contention that this memorandum here in my hand which has been made a part of the record was prepared by these AT&F agents solely from a tape recording that was furnished to them by this man?

Mr. Thompson: That is my understanding, Your Honor.

The Court: All right.

Examination by the Court:

Q. Now, do you know what was on that tape recording, Mr. Spires? A. Yes, sir.

Q. In substance what was on it? A. Well, I will just start at the beginning. I was down at Mr. Manners' house one night and he has got guitars and violins and what-have-you, amplifiers, tape recorders. We play a litle music and cut some tapes once in a while.

Mr. Quillen: Sorry, I can't understand him.

The Court: Said they played a little music and cut some tapes sometimes.

A. And so Mr. Manners wanted me to take him to Dover to see the Sheriff and I asked him what for. And he told me, now, when he started talking I turned this tape recorder on and he told me that he had bought a still from the Sheriff, Mr. Crockarell, and some cooling vats, gas tanks, condensers, and a hundred gallon of whiskey. And said he had—

The man had delivered the still and all but he hadn't got his whiskey. And he either wanted his money or his whiskey. So I carried him to Dover and I got on the phone in a pay station there and I called Mr. Crockarell. And I didn't identify myself.

I just told him that Sgt. Preston was there and wanted to talk to him. He told me that that was his name that he—that the Sheriff would know him by.

And so he talked to the Sheriff. I got out of the booth. I don't know what they said. But he said, he had an appointment to go on over to his house. And we went over to his house.

He knocked on Mr. Crockarell's door and Mr. Crockarell come to the garage and I set in the car. And he talked to Mr. Crockarell, but, now, what they said, anything like that, I don't know.

Q. Can you tell me what date that occurred? A. No. That is sometime back in '71. It must've been up in, oh, July or August, somewhere in there.

Q. Last year? A. Yes, sir. 1971.

Q. Did he tell you when he had purchased the still and the other items that he mentioned? A. He didn't say what date or no time. He just said he had bought those and the man had delivered them all except his whiskey. And he wanted his whiskey or his money. So that is what he told me. That was what was on the tape recording.

Q. Did he tell you that he had told the Sheriff that he wanted to load every damned thing I got here and that that was my still we had in Lane Hollow? A. No, I don't recall.

Q. Did he tell you that he had asked the Sheriff if he could have his two cooling tubs back? That they held a thousand gallons each and he needed them bad? A. No, sir, he never told me that. What he told me was, what I related was on the tape that he was telling me.

He told me that he had bought this cooker, condensers, and some gas bottles and that the man he had delivered them that he had loaded them, him and his son went to the Sheriff's smokehouse and loaded that, but he said he wanted his whiskey. Then said the Sheriff wouldn't let him have it.

He told him he would let him have that later. That he couldn't afford to let him haul it out that night.

Q. This tape recording was made when? A. It was sometime, I really don't know, it was in July or August. I really don't know. One of the months.

Because when I made the tape it was my personal reason that I made it and I didn't particularly put down any date or anything like that.

The Court: All right, does the government care to ask any questions of the witness?

Mr. Thompson: No, Your Honor.

The Court: Defendant, Mr. Quillen?

Mr. Quillen: Yes, sir.

*Cross-Examination by Mr. Quillen*

Q. Mr. Spires, who owned the tape recording machine that this tape was made on? A. I did.

Q. Had you taken it with you on this particular occasion to Mr. Manners' home? A. Well, I've got it in the car mostly all the time.

Q. Now, how long have you known Mr. Manners? A. Twenty or twenty-five years.

Q. Were you—you and he have been good friends over those years, have you not, sir? A. Well, we've been friends. I wouldn't say we was body friends or nothing like that. Just friends.

Q. Well, let me ask you this, Mr. Spires, have you on a good many occasions in the past year and a half or so discussed this particular case with Mr. Manners? A. Oh, I've heard him talk about it several times, yes, sir.

Q. Now, when was it that, or how long after this tape recording was made did you keep it in your possession? A. Oh, I don't know. Maybe two weeks or a month or something like that. I really don't know. I don't remember.

Q. When was it that you delivered it to someone or to Mr. Giles and Mr. Rollins? A. I really don't know what date it was. It was sometime, as I said, middle of last year. Could've been August. Could've been September. It could've been July. I really don't know what date it was.

Q. Well, do you recall where you were when it was delivered to Mr. Rollins and Mr. Giles? A. Yes, I do.

Q. Where were you? A. At my house.

Q. Was anyone else there present at that time? A. No, sir.

Q. Did Mr. Rollins and Mr. Giles listen to the tape there in your presence? To the tape recording? A. I don't recall whether they did or not.

Q. How did they happen to come there for the tape? Did you contact them or did they contact you? A. No. They came there best I remember, I didn't know Mr. Giles nor Mr. Rollins either one at the time, didn't know either one of the gentlemen.

And they came I think inquiring about somebody that lived there in Cumberland City and they knocked on my door. When they introduced theirselves we got to talking and so the subject come up about Lim. And they asked me, said, what do you think about it? I said, I think he is telling the truth, at least that is what he told me and I've got it on tape.

And they asked me did they mind if they had the tape and I told them, no, go ahead and take it with them. That I wasn't going to use it anyhow.

Q. Who was that person in Cumberland City they came inquiring about? A. It seems to me like it was a Thomas or Thompson, something like that.

Q. Did you know the person? A. No, I didn't know him.

Q. What size town is Cumberland City? A. It is a small place.

Q. How long have you lived there? A. About 25 or 27 years. Twenty-eight. Something like that.

Q. Population of Cumberland City two or three hundred people? A. It is more than that now. It was more than that then. Lot of people live there in trailers that works at the steam plant that I don't happen to know. All the old residents I know.

Q. Now, Mr. Spires, the tape that was delivered to Mr. Giles and Mr. Rollins, was there any other recorded matter on it other than this one conversation of Lim Manners? A. I don't think so but it could have been.

Q. Have you had any conversation since you delivered the tape to Mr. Rollins and Mr. Giles with them? Have you had any conversation with them about the tape? A. No.

Q. They have never told you what they did with it? A. No, sir.

Q. Did they tell you at the time what they were going to do with it? A. No, sir.

Q. Did they tell you that they might use this against Mr. Manners, that they were investigating him in some way? A. No, sir.

Q. They were from what you said at that time talking with you about whether or not Lim was telling the truth about Sheriff Crockarell, is that right? A. Yeah, the substance, general conversation, you know. Just talking like.

Q. Well, I mean, was it, they had asked you— A. (Interposing) They asked me did I know Lim. I told them I did, yes, sir.

Q. And then they were asking you whether or not you thought that Lim was telling the truth about Mr. Crockarell and you told them you thought he was because— A. (Interposing) Well, I told that is what he told me. That is the way he told it to me.

Q. Well, after they had made their inquiry about this man Thomas, then they went into an interrogation of you, talking with you about this tape, and the investigation was being directed toward Mr. Crockarell, was it not? A. Well, I don't know. Two or three different subjects, talking about the place, how the steam plant was doing, first one thing and another. Didn't just start right off like that.

Q. But as I say, Mr. Corckarell, whether or not Lim Manners was telling the truth, that was part—insofar as it related to Mr. Crockarell, that was part of the conversation, wasn't it? A. I believe they did ask me what I thought about it. And I said—I said, well, that is what he told me. I said, in fact, I've got it on tape.

Q. Well, they were there actually investigating Mr. Crockarell at that time? A. But I put that on tape for my personal reasons.

Q. Well, what was that reason? A. Well, that is personal.

Mr. Quillen; If Your Honor please, I think the witness—

The Court; (Interposing) What do you mean personal?

Mr. Brandt; If Your Honor please, he doesn't want to answer the question. I don't know if he has any legal right not to.

The Court; Well, I don't know of any.

Mr. Brandt; He just in our conversations, Mr. Spires just indicated to me he would rather not go into that.

The Court; All right, I'm going to do this in this matter. I think we've wasted enough time outside the presence of the jury. Have a seat, Mr. Quillen. Let me make a statement so counsel will know what I want to do and what I want in the record before this case is concluded.

I'm going to put this man on the stand. I wouldn't blame either one of you for not putting him on the stand.

But I assume that both of you hate to vouch for his credibility, but I wouldn't blame you. But I will call him. I want the government to put both agents on the stand and let them testify in this matter when they got the tape and I do not want them saying they have no idea when they talked with this man or anything else because I know that has got to be in their reports somewhere.

And if they've got to have some time so they can make a forthright statement on it, I want to have them make a forthright statement ahead of time so we won't have any falderal in the witness chair about, I don't know when it was.

I want specific statements made as to when they got the tape from the man, the circumstances and so forth. How this memorandum was prepared and anything pertinent to it

I will permit both sides to interrogate them about it. I want the facts brought out on the thing because I think it is pertinent to the issues involved here.

The witness Manners having denied certain statements that were in this supposed Jencks Act statement attributed to him.

So, I think you're entitled to a full exploration of it. I don't think we need to waste any more time. Go ahead and do it in front of the jury.

Mr. Quillen: May it please the Court, I move to be allowed an opportunity to develop fully the circumstances of the destruction of this tape. Do it whenever the Court will permit me to do so. Because I want to make that the basis of another motion to dismiss the indictment against Mr. Crockarell. Or perhaps to declare a mistrial or to, in the third alternative, to suppress and strike the testimony of Mr. Manners. And I think I'm going to have to have an offer of proof.

The Court: You don't have to have an offer of proof. I'm going to let you interrogate the officers as to tearing up the tape recording before the jury.

Mr. Quillen: All right, if it has been done, if Your Honor please, under these circumstances was intentionally done, I think then we would be entitled to one of the reliefs sought in the motion I just made to dismiss or declare a mistrial or to have the testimony stricken and I want to get that in the record.

The Court: Well, you can get it in the record at such time it appears appropriate. But we can develop those matters in front of the jury.

Mr. Thompson, do you have any comment to make?

Mr. Thompson: Your Honor, do I understand this witness is going to be questioned before the jury?

The Court: Yes, sir.

Mr. Thompson: By the Court.

The Court: No, sir, not by me. By you or Mr. Quillen.

Mr. Thompson: As to all these matters?

The Court: I'm going to do this, Mr. Thompson. I think the jury is entitled to know these things that have been represented to me by the government in open court.

It has been represented to me by the government that this particular document was prepared by agents of the AT&F. And that it was prepared exclusively from a tape recording which was furnished to them by this man.

I want this thing—first I will read it myself if necessary to the jury because he has been—Lim Manners was questioned about it yesterday and cross examined about it and denied certain statements that are in here. And I think the jury is entitled to know that the government said in some way that somebody—it indicated Lim Manners had made these statements were contrary to these statements that he had made on the witness stand.

Ordinarily it would be quite ordinary to call the agent who asserted that he made these statements. We don't have an agent in this matter. We've just got this man. And he doesn't say that he made these statements. But I think the defense is entitled to bring that out.

Mr. Thompson: There is nothing—the hitch is whether or not this was actually transcribed verbatim.

The Court: Well, of course, it wasn't transcribed verbatim.

Mr. Thompson: Well, I think that is shown.

The Court: But it is up to the people who did the transcription to say whether or not they added things to it.

Mr. Thompson: Absolutely.

The Court: And you have told me they said they didn't.

Mr. Thompson: To understand the situation, as I understand it, if Your Honor please, Manners has testified

a certain way. This witness told him he said the same thing. The statement that the agents came up with says something else. And that area needs to be explained some way. I agree with you.

As far as the testimony is concerned, it is all one way. Whether it was stenographic error or what, I don't know. But the error in it worked against the ATF's position if you consider it as such. If they made an error in that regard it was against their interest. We're perfectly willing to put on both of these agents right now without any further recesses or anything else or have Mr. Quillen put them on or have Mr. Quillen interrogate this witness.

We're not trying to hide anything in this case, Your Honor. But I think the proof shows what the facts are in this case and we'll explore it as far as you want.

The Court: Well, shown what the facts are, at least we've had proof with reference to facts up to now. But we have something here that, I will admit it is new to me. This unsigned, unauthenticated Jencks Act statement which the only way we would ever know how it got prepared is your statement and you're depending on what the agents have told you.

They haven't got anything to back up what they say. Just hanging up here in limbo.

Mr. Thompson: If Your Honor please, without any further going, we can back that up. We've got the daily record. The question raised in my mind and being concerned about the record in this case, if this man is going to be questioned in front of the jury, he is going to go and state the fact that Lim Manners told him substantially the same story that Lim Manners has testified today beforehand.

The Court: He is going to testify also that he didn't say certain things about it being his still and so forth.

Mr. Thompson: Which is the same thing Lim Manners said. The only onus being on these agents I agree with you, but as far as the record in this case—

The Court: (Interposing) All right, I will entertain an objection by the defendant to putting anything in the record.

Mr. Quillen: If Your Honor please, at this time I am not prepared to examine Mr. Spires. Of course, I would not want this document put in the record in its entirety.

The problem with it is its authenticity. From the best I can judge of it, it is not, of course, a verbatim statement. There is language here that I know not to be the normal language of the alleged spokesman. And I am not, insofar as Mr. Spires is concerned, I would not want to cross examine him directly or cross examine him without having had an opportunity to interview him.

I just wouldn't do it at all because, and, of course, under the circumstances, if I did conduct an interview of him, I would certainly do it under perhaps in the presence because as I stated I think it should be known I know Mr. Spires. I have and do now represent him in a matter. But I didn't know that he had anything in the world to do with this case until today.

And but I would think before I be required to ask him anything, or for that matter to ask of Mr. Rollins or Mr. Giles, that is to close my interrogation of them, I should have an opportunity to make an investigation which would be to interview Mr. Spires if he is willing to talk with me, and find out as much as I can about what really happened, what this motivation is.

He might tell it to me when he doesn't want to tell it here in court.

Mr. Thompson: If Your Honor please, if I might respond to that one point at a time. In the first place,

this man is under oath. I assume he would be telling Your Honor everything that he would tell Mr. Quillen or wouldn't tell any falsehood.

In the second place he is the Court's witness. Mr. Quillen has no right to interview him. I don't have any right to interview him. I'm perfectly willing for the Court to ask him any and all questions.

The Court: Well, I propose to offer him as a Court's witness. But I certainly wouldn't do so if either one of you wanted to offer him.

Mr. Thompson; I don't care to talk to him. If Your Honor please, this is a Jencks Act statement as far as the nature of the statement and its purpose is concerned which is to impeach Lim Manners, to impeach a witness, only reason for the Jencks Act and use of the Jencks Act statement.

We've gone to the horse's mouth just like it was given to an agent. We've got the man who allegedly was responsible for it which is completely consistent with what the witness says.

Now, if there was an error in transcription, if these men made an error in the course of their jobs or secreatary made an error, that is bad.

The Court; Mr. Thompson, the addition of statements, they were my cooling tubs. It was my still in Lane Hollow are not typographical errors.

Mr. Thompson; If Your Honor please, I can't explain it. I don't know. I don't know that they are. I don't know that they are not. I can't say that. I don't know what happened. If Your Honor please, all I know is that the witness has testified one way and the man who took the tape has testified another way.

Now, if Your Honor please, what can—to impeach Lim Manners, what can they use? Can they use the testimony of this man? They certainly cannot.

Do they want to put on the agents themselves? They have a perfect right to do that? Are we going to get bogged down in another—

The Court; (Interposing) We've been bogged down here all day in the matter. Frankly, I think that what the defendant should do is call Rollins and Knight since it has been stated—I mean, Rollins and Giles, since it has been stated that they prepared this statement and this statement contains things that are contrary to the testimony of Lim Manners on the witness stand.

And ask them the source of it. If they say that that source was a voice which they recognized as that of Lim Manners and in that he made the statements in here, that would be impeaching the testimony that the defendant should have with reference to Lim Manners' testimony. I don't know why the defendant hasn't proposed to do that. That is really the contradictory evidence, not this man, but the two agents.

Had you thought of that, Mr. Quillen?

Mr. Quillen; Well, if Your Honor please, I'm hesitant about calling witnesses who are government employees and without an opportunity to make some further investigation of this, I would hesitate to at this time.

The Court; We're not going to play around with this case and get a mistrial, Mr. Quillen, I will tell you that.

I don't see any reason why you can't call Rollins and Giles on the basis of the information you already have but if you want 15 or 20 minutes to talk with them and see what they're going to say about this, I will let you do that.

Mr. Quillen; If Your Honor please, it is simply this. There has been testimony here from Mr. Giles which my client says is not true. He contradicted it. I don't want to be bound by what anyone like that would say.

The Court; All right, if you will tell me that you want them called so that you can cross examine them, I will do that. I will give you an opportunity to talk with both of them before you do. But it seems to me that they're the only people—

Really, I'm trying to keep this record so it won't bounce back. They are the only people who apparently will testify that Lim Manners has told a falsehood on the witness stand. They apparently are in position to do that. If they say that they heard him—his voice say something contrary which they put down in the statement.

Mr. Quillen; There is another thing, if the Court please, that I'm interested in. In the other trial of this case in January, on January 18th, I believe, we asked the Court for the Jencks Act statements. At that time we were furnished some Grand Jury testimony of Lim Manners. We were not furnished this document here.

Now, the government either had it at that time and didn't furnish it to us as—

The Court; (Interposing) Well, I'm not going into that, Mr. Quillen. I mean, I don't know how you could resolve whether or not you were furnished it or not. I don't know whether Mr. Thompson knows whether or not you were furnished it.

Mr. Thompson; I don't know. I assume Mr. Quillen is telling the truth. It doesn't have anything to do with anything. He got a mistrial right after it.

The Court: We've got a new thing going here. It has nothing to do with it.

Mr. Quillen: If the Court please, I move to adjourn this trial until such time as I can make an investigation which will include an interview with Mr. Spires. I want to start my investigation from there. And then I might be prepared to call either Mr. Giles or Mr. Rollins.

The Court: Now, sir. We're not going to do that. I will give you from now until two-fifteen, Mr. Quillen, to talk with Mr. Rollins and Mr. Giles to see whether you want to put them on the stand or if you think that you would not want to offer them.

But I think that certain of their testimony would tend to impeach the testimony of Lim Manners, which he has given here in the court. And if you don't want to call them, why, you can ask me and I will call them myself and advise the jury that you are not calling them as your witnesses, but I'm calling them for the purposes of examination.

Mr. Quillen: Adjourn until what time, Your Honor?

The Court: Two-fifteen.

Mr. Thompson: Your Honor, as long as we are discussing these matters, I would also like to add and I think I've got a perfect right, not a right, but I think Your Honor should grant me the opportunity to call this man in rebuttal as to the fact that he made a telephone call for Lim Manners to this Sheriff and as to the fact that he witnessed the conversation between them.

The Court: You can if you can establish when it occurred, Mr. Thompson. This seems to have been a year later to the transaction that we've got involved in the lawsuit.

Mr. Thompson: Transaction, of course, happened in '70. But the fact that he didn't get his whiskey lingered on into '71.

The Court: Well, if you can establish any dates and so forth from your government agents, why, I will permit you to call him certainly. As to how much of his testimony is competent, that would be another question.

Mr. Thompson: I prefer Your Honor call him also if want to call these agents and not have Mr. Quillen vouch for their credibility.

The Court: If anybody wants to ask me to call some of the witnesses, I agree I would hate to vouch for most of them I've heard for the last three days.

Court is in recess.

(Thereupon, at 1:55 p.m., same day, court was in recess.)

AFTER RECESS.

(Thereupon, at 2:30 p.m., same day, court was in session, and the jury of twelve and one alternate remained excluded from the courtroom, and in their absence the following proceedings were had, to-wit:)

The Court: Will you advise me what the situation is, please?

Mr. Quillen: May it please the Court, during the recess Mr. Howell and I talked with Mr. Giles, Mr. Rollins and Mrs. Eatman, who is an employee of the Alcohol and Tobacco Tax Division and who is the person who actually did the stenographic transcribing of this tape.

I can only say at this time, if Your Honor please, that the statements of Mr. Giles and Mr. Rollins surrounding the circumstances of obtaining the tape differ substantially and materially from the testimony of Mr. Spires.

Now, that being the situation, at this time I would not be prepared to call either Mr. Spires, Mr. Giles, Mr. Rollins, Mrs. Eatman or anyone else as a witness. And I do move the Court for to be allowed additional time to conduct further investigation which, as I say, will include what I hope can be an exhaustive interview of Mr. Spires, if his court-appointed attorney will allow him to make any further statement about it.

Mr. Thompson: If I might make a short statement. I think in the first place we need to—Mr. Quillen ought to state what that variance is.

As I understand it, from what the agents have told me, it is this. That from all the testimony Mr. Spires gave he said, if I remember correctly, that the agents came to him when the agents stated that in fact Mr. Spires called the agents. If I'm not mistaken that is the variance that Mr. Quillen is talking about. And, of course, we're talking about something that happened about a year ago.

If Your Honor please, I might go ahead and make this suggestion, and offer this to counsel for the defendant. In trying to get back into the trial of this case. If I might just say this.

We have a Jencks Act statement which, of course, can be used if it is admissible to impeach on two points if I remember correctly the testimony of Lim Manners.

We have a witness here who says something and the agents a bit different. We would stipulate, I think it is obvious regarding of whether Mr. Spires is called, whether he is called by the Court or the government or us, whether these agents are called, whether it is by the Court, the government or us, that the entire statement is going to have to be made known.

We would be willing to stipulate at this time that Lim Manners did in fact give this very statement that we're talking about. But certainly not, there would be no physical way to separate out and it would certainly be unfair and unjust to separate those two sentences apart from the other statement. Now, Mr. Quillen can't have his cake and eat it, too. We'll go either way. That is the only way that this can be used for the defense, to impeach Mr. Manners. If they want to use it, fine, we'll stipulate to it. If they don't, that is fine, too.

The Court: Wait just a minute, Mr. Thompson. Repeat it, what you're willing to stipulate.

Mr. Thompson: We are willing to stipulate that Lim Manners on or about the time Mr. Spires testified told Mr.

Spires exactly what is in that statement. The entire statement.

That that would explain Mr. Spires, of course, an individual. I certainly do not think it would be fair for the counsel or the Court to single out giving this to the jury any particular sentence or sentences.

I think that is for argument of counsel, if Your Honor please. Now, what can be more fair than that? We could've examined four or five witnesses and spend another two days, but that would be the ultimate question, whether or not Lim Manners is going to be impeached on those two points.

The Court: Well, that is true that the question is whether Manners is impeached on these two points. That is all. Therefore, I don't understand your insisting that the jury have the whole statement. If you are willing to stipulate that Lim Manners in an interview, even though unknowing interview perhaps, perhaps.

Mr. Thompson: Yes, sir. That is another point. Of course, man is talking to a drinking buddy or somebody, there is several different explanations for that, if we want to get into that. I think we have passed that.

One of the statements Mr. Quillen underlined, I told the Sheriff if there was any way I wanted to load every damned thing I got here. That was my still they got in the Lane Hollow.

Now, how could we separate that out without talking about why he told the Sheriff he wanted to load everything. It would be as far as truthfulness of the central issue of this lawsuit is concerned, Your Honor, it would be a miscarriage of justice I feel like—

The Court: (Interposing) No, Mr. Thompson, you know full well in the use of Jencks Act statements, that the only thing that is ever pointed out in connection with

the examination are the things that might be of some value to the defense. They don't reiterate all the things that have been stated by a witness. That would not be the normal course.

If this statement had been made and so attributed to an agent of the federal government, for instance, Mr. Rollins, the defense would be entitled to put Rollins on and ask him if Manners told him that that was his still in Lane Hollow.

And further ask him if Manners told him that they were his cooling tubs. And quit right there.

Mr. Thompson: If Your Honor please, I would be allowed only to question the witness on the rest of it, though?

The Court: Sir?

Mr. Thompson: I would be allowed to question the witness on the rest of the statement. The fact that not only what we've got here, but the fact that this is from a previous consistent statement of a witness whose credibility is—

The Court: (Interposing) All right, if the agents were put on the stand it would be possible after those questions had been asked him by defense counsel to ask him if he didn't also tell these other things, that is certainly true.

But just to put on the whole statement ahead of time, that is a little far.

Mr. Thompson: I realize that is a matter that counsel will have to stipulate to. All I'm saying is if we put witnesses on the stand, one witness, two, three, four, that is what we're going to get down to, they are going to get the entire thing and they are going to ask him what they want to and I am going to ask him what I want to and the whole statement will be in.

The Court: What do you say, Mr. Quillen? Do you agree to that?

Mr. Quillen: No, sir, if the Court please. I think, assuming that we can be satisfied that this is authentic statement of Lim Manners, that it would be limited to the use of the language about the cooling tubs and my still in Lane Hollow.

And that they could not then go beyond that just because I have used that statement for impeachment purposes. They could not go into the entire statement.

The Court: Now, Mr. Quillen, that is new law on me there.

Mr. Quillen: Well, I don't—the only—we don't concede that any of it is genuine and I don't think that they would be entitled to go into all of that.

The Court: O.K., if you want to drop the whole thing, Mr. Quillen, that is O.K.

Mr. Quillen: If Your Honor please, I don't want to drop it.

The Court: Just a minute. No argument between counsel. I'm the Court. You have to talk to me. If either one of you want to talk, I'll listen.

Mr. Thompson: If Your Honor please, if they don't think this statement is genuine, we have no problem. Can't possibly impeach a man if they say the statement trying to impeach him with is not genuine.

I'll be willing if they will take the position, whether it is genuine statement, whether it is not genuine statement, whether they stipulate it is all true, want to call witnesses, anything to get on with the trial of this lawsuit.

The just simply can't have their cake and eat it, too.

The Court: I'm inclined to agree with you, Mr. Thompson. But if they do not want to stipulate, I know of no way to resolve the things except evidentiary hear-

ing before the jury on these matters, if they want to bring it up.

This may be a red herring, but we have had red herrings in lawsuits before.

Mr. Thompson: If Your Honor please, if I might suggest the position that we're in at the present time, I think it is up to defense counsel if they want to put on or the Court wants to put on any people here, we are ready, willing and able. But I think in all fairness and appropriateness that we ought to leave it up to defense counsel to call who he wants to.

The Court: Well, I think you are right. You don't have anything to put on. It is strictly up to defense counsel to put on who they want to. I'm offering them an opportunity to put on the government agents or if they don't want to put them on because they would be vouching for their credibility, I am willing to so call them and let them make—if they want to interrogate them.

Mr. Quillen: As I stated to Your Honor earlier, because of the conflict, I'm not prepared at this time to interrogate them even if they are called as the Court's witnesses.

Mr. Thompson: If Your Honor please, there is one conflict Mr. Quillen has been able to find in that entire statement. That is, who first contacted whom, whatever relevance that is, about something that happened a year ago.

The Court: Let me ask you this question. I'm trying to be fair, Mr. Quillen, if you want these two government agents called or possibly the stenographer, whatever it may be, would you be satisfied with a stipulation thereafter by the government that if the witness Spires were called to testify he would swear that they came to his house and whatever the circumstances were that he testified with reference to this matter? Contrary to what they've testified?

Mr. Quillen: Not at this time, if Your Honor please.

The Court: Well, I think that is fair, Mr. Quillen. Now, why isn't it fair? Mr. Brandt, did you have a matter? Hold it just a minute.

Mr. Brandt: If Your Honor please, I don't know where I stand in this but I've talked with Mr. Spires. Mr. Spires and I got back together and talked about this. He advises me that he did call Mr. Rollins and Mr. Giles but he thinks the confusion in his mind is he doesn't think he ever reached them on the telephone. And somehow they got word he wanted to see them and they came by.

Mr. Quillen: May we approach the bench with Mr. Brandt?

The Court: All right.

(Conference at the bench between the Court and counsel out of the hearing of the reporter.)

Mr. Quillen: I want this in the record. In addition to the conflict in the testimony of Mr. Spires and the statements made to me by Mr. Rollins and Mr. Giles while we were in the recess, it is now my understanding that Mr. Spires has admitted that these statements about owning the still, that is, about the still in Lane Hollow, that that is true. He remembers that.

That about recovering my tubs, that he remembers that.

Now, and that he now remembers more than he admitted remembering when he was here as a witness.

Mr. Brandt: I think that is perhaps my fault for not going over the statement with him.

Mr. Thompson: Of course, the man called out of the clear blue about something he didn't know anything about when he took the stand.

The Court: Now, now, Mr. Thompson, he got an hour and a half consultation.

Mr. Thompson: That is true as far as I am concerned.

The Court: He wasn't called out of the clear blue.

Mr. Quillen: But now simply and in summary, it is my understanding now that Mr. Spires is now going to—would testify materially different from what he testified just a little while ago.

Mr. Thompson: Which all tends to show—

Mr. Quillen: (Interposing) Excuse me a minute, please.

Mr. Thompson: Go ahead.

Mr. Quillen: I am of the opinion that Clayton Spires is a man who is fully capable and probably was working in conjunction with Lim Manners at the time.

The Court: Well, that may well be true, Mr. Quillen.

Mr. Quillen: Beg your pardon?

The Court: I say, that may well be true. I say this, I think Spires will testify every time it was one-twenty. He would testify again at three o'clock. He can testify Monday morning. And I suspect there would be material variances in his testimony every time he got on the stand and took the oath.

But we can't just keep on waiting to get a new story every day.

Mr. Quillen: I'm also interested in knowing the entire contents of that tape, whether there might not have been some other matters on it that would have been of interest, at least helpful to the defendant, and was destroyed.

The Court: Well, you can ask the agent about that. That is all you can do.

Mr. Quillen: I would like to talk to Mr. Spires about it.

Mr. Thompson: If Your Honor please, that is just like any Jencks Act statement. The same principle would

be involved even if they didn't have a tape. They could have refused to put things in a statement without involvement in tape. And would have that same issue and do have that same issue potentially every time we have a trial.

The Court: You can ask the agent, but that is as far as—

Mr. Quillen: (Interposing) I'm going to also have the question of what I think was an intentional destruction of a tape.

The Court: O.K. But you can ask them about that. But you can do all that this afternoon.

Mr. Quillen: But Mr. Thompson as I understood it this morning was representing to the Court that the tape was destroyed because this was an investigation of Lim Manners and that that—

Mr. Thompson: (Interposing) No, no, that is not the impression I meant to give. As I understand it, of course, you understand the source of my information, first place I don't know about stomping the tape and flushing it down a toilet or anything. But I know it was erased.

They used the word destroyed to me and that constitutes erasure. Now, they told me that after Lim talked to them and they knew Lim was going to testify with regard to Sheriff Crockarell case, in their mind they didn't need the tape any longer.

Mr. Quillen: In their mind they knew to get rid of it, that is what happened.

The Court: Well, you can argue that to the jury. All that is perfectly proper. But I'm trying to avoid continued delay in this case. I want to get this case concluded.

I know that we can't conclude the case today with argument and charge. First of all we can't run late because my court reporter has got two children graduating from high school tonight and he wants to be at that graduation.

Mr. Quillen: I have got one.

The Court: I'm not worrying about you, but worrying about my court reporter. I want to get the case over on Monday so we can charge the jury.

Mr. Thompson: This business about Mr. Spires, again Mr. Quillen indicates that Mr. Spires would now indicate that is an accurate statement, again, what is the ultimate issue? What are we trying to prove here? Is Mr. Quillen stating it is his belief and he is going to take the position it is an accurate statement now?

The Court: No, he is taking the position even if Spires says it is all there and even if it is all on tape, that it is probably a fake deal between Lim Manners and Spires.

Mr. Thompson: I am willing to forget about it.

Mr. Quillen: I think we would be entitled to at least some time over the weekend to explore it.

The Court: We're going to finish whatever we can this afternoon. I'm not going to conclude the case this afternoon and if you come up with something Monday morning that you want to present, then I will consider it. But this afternoon if you want to call these people or want me to call them, let me put this—this is all on the record.

I think that you are perfectly competent this afternoon of developing everything that we know about at the present time. That is, you could put on these two government agents. You could put on the government stenographer if you want to and question them as fully as you desire with reference to this matter.

The government can conduct additional examination of those witnesses just as they may desire. If either one of you want to call Spires, why, you may do so.

If you don't want to call him, but you want him put on the stand, I will put him on the stand. If you don't want him put on the stand, I won't put him on the stand.

Mr. Quillen: No, sir. I'm not ready at this time.

Mr. Thompson: That is all we want.

The Court: You're not ready to do anything. Let me make this statement. I'm making the ruling that we're going on with the case this afternoon and you can proceed in the manner that I have designated.

There is no reason that you can't. There is not a legal reason in the world that you can't interrogate these agents this afternoon about every matter that has been brought out by you and has been recorded by the court reporter.

There may be some additional matters you want to proceed on Monday morning. So, you're either going to proceed or you're going to close.

Mr. Quillen: Under the ruling of the Court that we would be permitted to go into other matters in that statement, if I asked these agents about those two particulars, one of them don't remember it. The other one does. But I would not open that gate for him to go into those others and so I will not ask him.

The Court: You mean you don't think the government has a right to say that all of this is what was on tape?

Mr. Quillen: I don't think they have the right to show all of that to the jury.

The Court: If we're putting them on the stand with reference to whether two of the things in there are correct or not, which you think might help you? That is all you would have to ask about, why is the government precluded from saying other things?

Mr. Thompson: We've got two inconsistencies and about a dozen consistencies.

Mr. Quillen: Another thing, I wanted to point out an item that language, there are words never used by Lim Manners. The word operable, that is not his language.

The Court: Everybody knows that.

Mr. Quillen: And some others.

The Court: I think you can develop by your witnesses that it is not a verbatim transcript. It is in their language.

Mr. Quillen: Well at this juncture, I would not interrogate any of the three at this time. The only thing that I could do would be to make my motion then I would like to have an opportunity to make an Offer of Proof with respect to the destruction of the tape.

I think that that was not done in good faith. I think it was a destruction, deliberate destruction of material evidence in a case and the government agents, having destroyed that evidence, then we should be entitled or we are entitled to have the case dismissed or to have a mistrial declared or in the third to have the testimony of Lim Manners stricken and I so move and I want to offer—

The Court: (Interposing) Well, that motion is denied. Now, let's get down to cases. What do you want to do this afternoon?

Mr. Quillen: May I offer Mr. Rollins to show the destruction of the tape? To get that into the record at this time.

The Court: You may make an Offer of Proof of that. What else do you want to do in connection with this case before you close?

Mr. Quillen: I have a witness, Mr. McMillan, who was not here yesterday. He was ill yesterday. He is here today. I would like to call him and that will be all.

Mr. Howell: Yes, sir.

The Court: Then you will close?

Mr. Quillen: Yes, sir.

The Court: All right.

Mr. Brandt: Can Mr. Spires and his new lawyer leave?

The Court: If all develops as has been stated.

Mr. Quillen: Now, when does my ban on talking to Mr. Spires, when does that get lifted?

The Court: It is lifted now.

Mr. Quillen: Because of the peculiar circumstances, any conversation I have with him even about his own affairs I will do in the presence of someone else.

The Court: You can talk with him.

Mr. Thompson: Of course, the defense has rested and we were through with our rebuttal. May I inquire as to the nature of this new witness that counsel has?

The Court: Do you mean McMillan?

Mr. Thompson: Yes, sir. Then he went ahead and closed.

The Court: No. No. Before that, are you talking about McMillan?

Mr. Thompson: Yes, sir.

The Court: My recollection is after that he said they were able to be here today since going over he would like to have permission to call him. I recollect that. That was done. So I see nothing wrong with the McMillan thing. That will be in the presence of the jury and that is all you want in the presence of the jury.

Mr. Quillen: That is all.

The Court: And then I can let the jury go until Monday morning?

Mr. Quillen: Yes, sir.

Mr. Thompson: Now, if you are going to push the destruction of the tapes situation, I think it would be only fair that we go ahead and call Rollins outside the presence of the jury and get the full story in the record. I mean, instead of just making statements.

The Court: I see nothing wrong with that. But you don't want it to go to the jury?

Mr. Quillen: No, sir.

The Court: All right. The only thing we're going to get—

Mr. Quillen: (Interposing) Yes, we wanted to see that original if we may concerning Mr. Spires.

The Court: That is the original. You can have it. Let me see if I have it straight.

You're going to offer a witness McMillan and then that is the end of the case? That is the end of the case as far as the government is concerned, is that right? And I can tell the jury that the case is closed?

Mr. Quillen: Subject to our motions when Your Honor—Your Honor's adverse rulings.

The Court: That's right. That's right. All right, then, I'm going to let the jury go until Monday morning at nine o'clock.

Then after they have departed, you can put on such proof as you want in connection with Offer of Proof in connection with something or another in connection with support of your motion. Do that immediately after I have let the jury go. Let the jury come in. Get your witness ready.

* * *

## NOTICE OF APPEAL

(Filed June 21, 1972)

The name and address of the appellant is Charles Crockarell, Box 12, Dover, Tennessee. The name and address of appellant's attorney is Dale Quillen, 308 Cavalier Building, 95 White Bridge Road, Nashville, Tennessee 37205.

The offense for which appellant is convicted is a violation of 18 U.S.C. 371 and 26 U.S.C. §§ 5601(a), 5686, and 7206.

Appellant is appealing from the judgment of the District Court entered on the 12th day of June, 1972, sentencing him to two (2) years on Count One of the indictment, all of which was suspended with the exception of four (4) months, and a fine of $3,000.00 and appellant placed on probation as to Counts Three, Four and Five of the indictment for a period of one (1) year which probation will run concurrent with the probation imposed on Count One of the indictment.

I, Charles Crockarell, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the above-stated judgment.

Respectfully submitted,

/s/ Charles Crockarell
Charles Crockarell
Defendant-Appellant

**No. 72-1750**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

CHARLES CROCKARELL
Defendant-Appellant

**ORDER**

(Filed February 15, 1973)

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

This cause having come on to be heard on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court being fully advised in the premises having concluded that no error prejudicial to the rights of the defendant-appellant occurred in the proceedings in the District Court,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court

/s/ James A. Higgins
Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-1393

CHARLES CROCKARELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that he was deprived of his right to confront a witness who invoked his Fifth Amendment privilege in refusing to answer a single question on cross-examination, and that the trial court erred in failing to hold an evidentiary hearing regarding the unavailability of alleged "Jencks Act" material.

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on four counts of an indictment charging him with the unlawful possession of distilling equipment in violation of 26 U.S.C. 5686(a), and with conspiracy to use his official position as sheriff of Stewart County, Tennessee, to establish and protect a distillery operation,

in violation of 18 U.S.C. 371.[1] He was sentenced to two years' imprisonment on the conspiracy count, four months to be served in jail and the remainder on probation. Sentence was suspended on the remaining counts. Petitioner was also fined $3,000 (Pet. App. A-5). The court of appeals affirmed (Pet. App. A-76).

In August, 1970, petitioner and a federal Alcohol, Tobacco, and Firearms agent conducted an unsuccessful search for an illegal distillery (Tr. 7-8). Petitioner subsequently discovered and seized the still, and the equipment was taken to petitioner's house and stored in his adjacent smokehouse (Tr. 45-48). Petitioner sold the distillery and "protection" to one Lim Manners for $1,400 (Tr. 65, 67, 70). The still was operated by Manners's sons, Melvin and Larry, until they were apprehended and charged with unlawfully fermenting mash (Tr. 88, 96).

1. Petitioner contends that he was denied his constitutional right to confront a witness against him because the prosecution called a witness who answered all questions on direct examination, but invoked his privilege against self-incrimination when asked a particular question on cross-examination. The witness, Melvin Manners, admitted knowing the name of the man from whom he bought sugar for use in operating the distillery, but refused to reveal the name on cross-examination, averring that by doing so, he would tend to incriminate himself (Tr. 148-149; Pet. App. A-26).

In *Namet* v. *United States*, 373 U.S. 179, 186-187, this Court recognized the interplay of two factors as

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[1] Petitioner's motion for acquittal was granted with respect to a count of the indictment charging him as an aider and abettor in the operation of the distillery (Tr. 410).

decisive of the defendant's rights when a government witness claims the privilege on direct examination: whether the government proceeded in good faith or instead was making an attempt to build its case out of invocation of the testimonial privilege, and second, whether an inference resulting from the exercise of the privilege added "critical weight" to the government's case. Under these tests, if the government presented only a weak case and called witnesses solely because they were expected to invoke the privilege, the conviction may be reversed. *United States* v. *King*, 461 F. 2d 53 (C.A. 8). But even where a witness is called in the full expectation that he will refuse to testify, there is no reversible error if the government does not rely on resulting inferences against the defendant to add "critical weight" to its case. *Cota* v. *Eyman*, 453 F. 2d 691 (C.A. 9), certiorari denied, 406 U.S. 949; *United States* v. *Brickey*, 426 F. 2d 680 (C.A. 8), certiorari denied, 400 U.S. 828.

In the instant case, neither of the *Namet* tests calls into question the admissibility of Melvin Manners's testimony. First, there is no showing of bad faith on the part of the prosecution, since the government had no reason to believe that Manners would refuse to answer questions posed either on direct or on cross-examination. The record shows that at petitioner's previous trial (which ended in a mistrial), Manners had denied knowing the name of the man from whom he bought his sugar (Tr. 105; Pet. App. A-13); at the second trial, he admitted knowing the name, but maintained that he had not learned the man's true name until shortly before the second trial (Tr. 146-148; Pet. App. A-25). The prosecution thus had no prior indication that such a question would elicit a refusal to answer.

Moreover, the government could not reasonably have anticipated that Manners would be permitted to claim his privilege, since he had already been convicted of offenses relating to his operation of the illegal distillery. The court, in fact, at one point ordered Manners to answer the question (Tr. 149; Pet. App. A-26). When Manners continued to assert his right to remain silent, the district judge then appointed an attorney who, after consulting with the witness, advised the court that in his view, the answer would tend to incriminate the witness in regard to an unrelated violation of law. Only then did the court rule that the witness need not answer the question (Tr. 155-159; Pet. App. A-31—A-34).

We note that the second test under *Namet* has not been met either, since petitioner shows no prejudice resulting from the witness' narrow exercise of his Fifth Amendment privilege. The one question he declined to answer bore no relation to petitioner's activities, and was merely tangential to the case.[2] The witness's refusal to answer created no inference unfavorable to petitioner. Petitioner's attorney conceded that the question was asked only in the anticipation that a truthful answer would reflect on the credibility of an unnamed prosecution witness (Tr. 111; Pet. App. A-18).

2. Petitioner also contends that the trial court should have conducted an evidentiary hearing to determine whether the government violated the Jencks Act, 18 U.S.C. 3500, by failing to turn over to the defense an original "statement" of a witness. The argument is without merit. The "statement" was a tape-recorded

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[2] The court indicated at one point that it was disposed to sustain the government's objection that the question was irrelevant (Tr. 108-109; Pet. App. A-15—A-16).

conversation between a government witness, Lim Manners, and one Clayton Spires, in which Manners allegedly told Spires of his purchase of the distillery from petitioner (Tr. 308; Pet. App. A-47). Prior to petitioner's trial, Spires contacted Treasury agents and advised them that he had taped such a conversation for his own purposes, but that he no longer needed the recording (Tr. 313; Pet. App. A-50). He gave the tape to the government agents, neither asking nor receiving anything in return (Tr. 353). The recording was subsequently played for a stenographer, who made shorthand notes from it (Tr. 354, 364). From these notes, a federal agent composed a "statement", which the stenographer typed (Tr. 358-359). The tape recording was then erased, and in accordance with her usual practice, the stenographer destroyed her shorthand notes (Tr. 354, 364). The prepared "statement", which concededly was not a verbatim transcription of the witness's own words, was supplied to the Assistant United States Attorney, who furnished a copy to petitioner's counsel (Tr. 299; Pet. App. A-40).

The foregoing facts were established in open court, in the absence of the jury, by the testimony of the federal agent, the stenographer, and Spires. Petitioner's attorney was also offered an opportunity to question Spires and the agent in the presence of the jury, but he declined to do so (Tr. 321, 345; Pet. App. A-56, A-73). Thus, the district court did conduct a thorough inquiry into the unavailability of the original tape recording, and had ample basis for ruling that the failure to produce the tape was not a violation of the Jencks Act.[3]

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[3] It seems, in any event, that the tape recording was not required to be produced pursuant to the Jencks Act, since the "statements" contained therein were made, not to a government agent, but to a private individual who made the recording for his own purposes.

It is therefore respectfully sumitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JUNE 1973.

DOJ-1973-06